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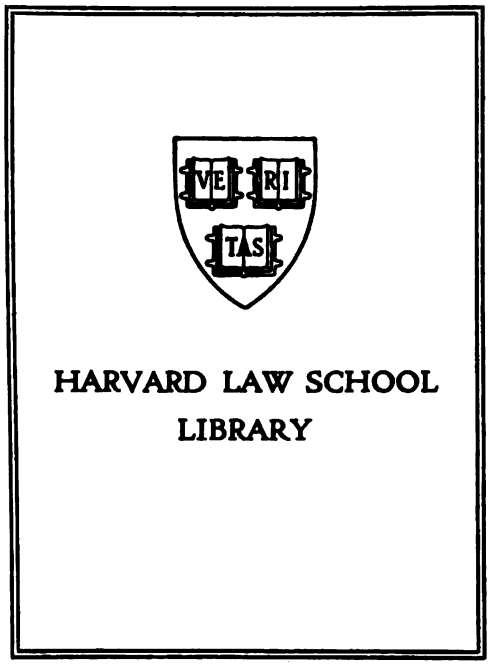

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MASSACHUSETTS REPORTS

212

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1912—OCTOBER 1912

HENRY WALTON SWIFT

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY.

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OF THE

SUPREME JUDICIAL COURT

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WALTER L. HILL & others *vs.* JAMES S. MURPHY & others.

Suffolk. January 11, 12, 1912. — May 23, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Corporation, Directors, Officers. *Equity Jurisdiction*, Bill by minority of stockholders of corporation, *Res judicata*. *Libel*. *Equity Pleading and Practice*, Parties. *Res Judicata*. *Judgment*.

If the directors of a corporation, acting wholly outside the legitimate business of the corporation and for their own personal ends, publish in the name of the corporation a false and malicious libel concerning a person, who brings an action for the libel against the corporation and recovers substantial damages, the corporation can recover from the directors in an action at law the amount paid by the corporation upon the judgment in such action and the expenses incurred in defending it; and, if those in control of the corporation refuse to enforce such liability, a minority of the stockholders can maintain a suit in equity against the directors and the corporation to compel the directors to pay the amount of such judgment and expenses into the treasury of the corporation.

In such a suit in equity, where the treasurer of the corporation is made a defendant, a demurrer by him should be sustained, if it appears on the allegations of the bill that he did not participate in the publication of the alleged libel and merely did his duty as treasurer in paying the execution on the judgment against the corporation. An allegation, that demand was made upon him to proceed "in accordance with the by-laws of said corporation" to collect from the directors the sums expended in paying the judgment and expenses, is insufficient to show liability on his part without setting forth by-laws that authorized the institution of such proceedings by the treasurer.

In a suit in equity by a minority of the stockholders of a corporation, against the directors and the corporation, to compel the directors to pay into the treasury of

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the corporation the amount of a judgment paid by the corporation in an action at law against it for a false and malicious libel published by the directors in the name of the corporation, if it appears that when the judgment was obtained against the corporation an action also was brought against the defendant directors for the same libel in which judgment was entered for the defendants, such judgment is not a bar to the suit in equity, the issues and the parties in the two proceedings not being the same.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 16, 1911, by certain stockholders of the Eastern Cold Storage Company, a corporation, against the directors of that corporation, the corporation and its treasurer, containing the allegations which are stated in the opinion.

All of the defendants demurred to the bill. They also filed an answer. The case came on to be heard before *Morton*, J., who reserved it upon the bill, the demurrers, the answer and an agreed statement of facts for determination by the full court.

S. M. Child, for the plaintiffs.

W. A. Buie, for the defendants.

DECOURCY, J. It must be assumed, for the purpose of the demurrer, that the following facts alleged in the bill are true. The defendants Murphy, Musgrave, Simonds, Jones and Mason, as directors of the Eastern Cold Storage Company and in its name, published a false and malicious libel of and concerning one Walter L. Hill in connection with his official acts as treasurer and director of the company. Hill brought an action against the corporation for the libel and recovered judgment for a substantial amount; and this sum, together with the expenses incurred in defending the action, was paid by the defendants out of the treasury of the corporation. It is further alleged that the publication of the libel was wholly outside the legitimate business of the Eastern Cold Storage Company, that it was maliciously circulated by the defendant directors to injure the plaintiff and to gratify their own personal ends, and that demand was made upon them to reimburse the corporation.

Clearly the bill sets out a cause of action in favor of the corporation against the defendant directors. When directors intentionally act *ultra vires* of the corporation, they are liable for the losses it sustains in consequence. *Richardson* v. *Clinton Wall Trunk Manuf. Co.* 181 Mass. 580. *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252, and cases cited. *Leeds Estate, Building & Invest-*

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ment Co. v. *Shepherd*, 36 Ch. D. 787. *Williams* v. *McDonald*, 15 Stew. 392. And regardless of whether the publishing of the libel was within the powers of the corporation, the tortious act alleged to be wilfully done by the directors to gratify their own personal ends, was a breach of the duty they owed as *quasi* trustees and it has resulted in loss to the corporation. The liability of directors is not limited to cases where the loss to the corporation results from fraudulent misconduct on their part, or where they have received financial profit which in equity belongs to the company. *Von Arnim* v. *American Tube Works*, 188 Mass. 515. *Greenfield Savings Bank* v. *Simons*, 133 Mass. 415. And the familiar decisions of non-liability of directors acting honestly and within their powers for losses sustained by the corporation through their negligence, do not apply. *Lyman* v. *Bonney*, 118 Mass. 222. *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480. *Hun* v. *Cary*, 82 N. Y. 65. *Savings Bank of Louisville* v. *Caperton*, 87 Ky. 306. See *Phœnix Ins. Co.* v. *Frissell*, 142 Mass. 513.

This liability ordinarily would be enforced in an action at law by the corporation, but where those in control refuse to act, the minority stockholders may bring a bill in equity in behalf of and for the benefit of the corporation. The allegations in the bill, while somewhat meagre, fairly bring the case within the rule where the plaintiffs have no remedy within the corporation. *Brewer* v. *Boston Theatre*, 104 Mass. 378. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495.

It is conceded that if a case is stated against the directors then the corporation is a proper party. As to the defendant directors and the corporation the demurrer must be overruled.

But the demurrer of the defendant Smith must be sustained. He was not concerned in publishing the alleged libel, and did only his duty as treasurer in paying the execution against the corporation. The allegation that demand was made upon him to proceed "in accordance with the by-laws of said corporation" to collect from the directors the sums expended in paying the judgment and expenses is insufficient without setting out by-laws that authorize such proceedings by the treasurer.

Upon the issues raised by the bill and answer the allegations in the answer are controlled by the agreed statement of facts. *Taunton* v. *Taylor*, 116 Mass. 254. The admission that "it is useless

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for the plaintiffs to seek for the relief sought for in their bill by any action within the corporation" establishes the right of the plaintiffs to recover if the Eastern Cold Storage Company itself could maintain the action; and the demand admittedly made upon the defendant directors to reimburse the corporation appears to be sufficient, if demand was necessary. The defendants seek hereby to raise two questions in addition to those resulting from the demurrer. The first is that in publishing the circular letter the defendant directors were protected by the law of privileged communications. Without conceding that this question is open in an action by the corporation for reimbursement, it is not supported by the answer or agreed facts. Aside from the general denial in the answer that the defendants published a false and malicious libel, it is not stated that the circular, which it is agreed was signed and published by them, was in the performance of any duty or in good faith, without actual malice; nor is there any denial of the allegations that the publication was wholly outside the legitimate business of the corporation, and was issued to gratify the personal ends of the directors.

The other defense argued is that the defendants were sued individually by said Hill for the same libel, and that judgment was entered for them. The record in the two actions brought by Hill is not before us. Presumably the corporation was held answerable because the libel was published by its agents in the course of their business. *Fogg* v. *Boston & Lowell Railroad*, 148 Mass. 513. And while the plaintiff could recover against either the principal or agents he could not look to both where the tort complained of was not their joint act. *Parsons* v. *Winchell*, 5 Cush. 592. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487. But whatever the explanation the issues and parties were different, and the judgment in the former action is not a bar to recovery in the present one. In that proceeding the question was whether the defendants were individually liable to Hill; in the present one the corporation seeks indemnity for the damages it suffered due to the misuse of their powers by the defendants while acting as its directors.

A decree for the plaintiffs is to be entered; its form and details to be settled before a single justice.

So ordered.

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JOHN BRIGGS *vs.* EDWARD P. BOYNTON & another.

Middlesex. January 16, 1912. — May 23, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Bills and Notes. Equity Jurisdiction, To enjoin action on note. *Contract,* Construction.

In a suit in equity to enjoin the prosecution of an action at law on a promissory note payable to the defendant and signed only by the plaintiff and to determine the rights of the parties under an agreement concerning certain shares of stock, it was found by a master that the note was given as the last of successive renewals of a note given by the plaintiff, the defendant and two others for money used to purchase certain shares of stock upon a joint venture, that the note sued upon was incomplete, that it was intended to be a joint note signed by all the parties as makers or indorsers before delivery, and that as between the parties it was intended to be binding upon each of them only for his one fourth share. By an agreement in writing, made when the original note was given, the stock was to be held "for the mutual benefit and equal rights" of the parties to the agreement, and the plaintiff guaranteed to sell within ninety days sufficient stock to provide the amount of the note, the money thus received to be applied to the payment of the note, and the balance of the stock to be delivered one fourth to each of the four parties. The sale was not made. The defendant paid the note at maturity and the renewals were made for his reimbursement. At the time of one of the renewals a new agreement in writing was made by the four persons, by which the plaintiff agreed that within ninety days he would sell enough of the stock to pay the new note and that upon his failure to make such sale within ninety days he should forfeit all his "right in the equity of any part" of the shares of stock. No sale was made. *Held,* that the plaintiff's liability on the note was limited to his one quarter share in the enterprise; *also,* that the right forfeited by the plaintiff by his failure to make the sale was only the right to share in the division of the stock remaining after the sale of enough of it to pay the note, and that he did not forfeit also the right to have the proceeds of the stock first applied to the payment of the note; and accordingly that a sale of the stock or of enough of it to pay the note should be ordered and that the plaintiff should be held answerable only for his share of the balance unpaid, if there should be any.

BILL IN EQUITY, filed in the Superior Court on May 4, 1908, to restrain the defendant Boynton from further prosecuting an action at law against the plaintiff on a certain promissory note described in the opinion, and to determine the rights of the parties under an agreement in writing by which certain shares of stock were placed in the name of the defendant Gould as trustee.

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The case was referred to Edwin D. Sibley, Esquire, as master. The findings contained in his report are stated in substance in the opinion. The case came on to be heard before *Fox*, J., who reserved it upon the pleadings, the master's report and the exceptions thereto for determination by this court.

The case was submitted on briefs.

A. G. Carver, P. W. Carver & O. C. Scales, for the plaintiff.

J. A. Harris & F. B. Livingstone, for the defendants.

HAMMOND, J. The master has made certain findings which in substance are as follows.

In June, 1906, the plaintiff with the defendants and one Lane, four in all, became interested in the purchase of fourteen thousand shares of the stock of a corporation organized under the laws of the State of Maine. In order to purchase the stock the parties made a promissory note for $1,522.50, dated June 15, 1906, payable ninety days after date to the order of Gould and secured by collateral, the property of Boynton. The note was signed by Boynton and indorsed by Gould, Lane and Briggs, and on it was obtained from the Beacon Trust Company the sum of $1,500 with which the stock was purchased, the certificate being taken in the name of Gould. For the protection of all parties a written agreement setting forth the rights of the parties was executed by the four. It was dated June 15, 1906, and declares that the stock which had been bought was deposited with Gould "for the mutual benefit and equal rights" of the parties to the agreement; that Lane and Briggs guaranteed to sell within ninety days from June 15, 1906, "sufficient stock to the amount of fifteen hundred twenty-two and 50–100 (1,522.50) dollars," the money thus received to be deposited with Gould and to be applied to the payment of the above mentioned note; that should the sum of $1,522.50 be obtained before the expiration of the said ninety days, and the outstanding note duly cancelled, the balance of the stock should be immediately delivered, one fourth thereof to each of the four parties; the stock when thus divided to be the personal property of the one receiving it and the joint undertaking to be thereby terminated. The price at which the stock was to be sold by Lane and Briggs seems not to have been fixed in the agreement, but to have been left to their discretion.

The master finds that "Up to this point . . . there was a

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joint undertaking by all these parties for profit; that they purchased the stock with the proceeds of this note and intended to sell the stock within ninety (90) days, so that when the note came due they would be able to meet it from the proceeds of the sale of the stock and close up the whole transaction," dividing equally between them the balance of the unsold stock.

No stock was sold, and the note at its maturity on September 15, 1906, after due demand and protest, was paid to the trust company by Boynton, and another note was given. As to this second note the master reports that Gould testified that it had been destroyed by him "because it was superseded by one of exact character in every detail," namely, a third note. This third note which was given in the place of the second note was dated December 13, 1906, "was for ninety (90) days payable to the order of Boynton, signed by Gould and indorsed by Boynton, by his attorney, Gould, and also indorsed by Briggs." At this time a new written agreement was executed between the same four persons, "setting forth that they had purchased the fourteen thousand shares of stock; that the stock was in the name of Gould, in trust, for the benefit of all the parties; that Lane and Briggs, in consideration of a loan by Boynton of $1,545.33 (which the evidence showed was the original $1,500, with the accumulated interest), . . . would within ninety days sell enough of the stock to pay [the] loan of $1,545.33 and deliver [the] amount with interest, to Gould for Boynton as payment of the loan. That the balance of stock remaining unsold should be equally divided between the parties, and that upon the failure of Lane or Briggs to make the sale of the stock within ninety days, they, Lane and Briggs, each should forfeit all their right in the equity of any part of the fourteen thousand shares of stock. This agreement was signed by all the parties who affixed their seals, the other agreement above referred to not being under seal." The master further finds that no loan had been made by Boynton although the agreement states that one had been made. He, however, had paid and taken up as above stated, the original note.

The third note was placed in the bank for collection. On its maturity on March 13, 1907, no notice was sent to Briggs by Boynton, but the day after it came due Briggs went to Gould's office and desired to renew it. Gould drew up the note declared

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on, which is for $1,568.51, signed by Briggs, payable in ninety days to the order of Boynton, witnessed by Gould and indorsed by Boynton, and sent it to Boynton who was in Florida. As to this note the master says: "Gould testified that he did not get Lane to sign this last note, . . . nor had he, Lane, signed the [third] note, . . . and the reason Gould gave was that Lane was not accessible; but that he, Gould, wrote [to] him [Lane] . . . to come to Boston." On June 12, 1907, the day of the maturity of this last note, Briggs desired to renew it, but Boynton finally refused. The master further finds as follows:

"All the evidence in this case goes to prove that there was no money contributed by any of the parties at the start, but that a certain sum was raised from the bank by the [first] note. That the money was used to purchase stock for their joint benefit and the stock, so far as the holder of it is concerned, is still held for their joint benefit, subject to the agreements. I find that the second and other notes were each given in renewal of the next preceding one and that the last note given by Briggs, payable to Boynton, was for that purpose and no other, and it was expected by Briggs, signer of the note in suit, that the other parties to all of the former notes would sign said note. I find upon the evidence that said note was not a complete note according to the intention and understanding of Briggs at the time he gave it to Gould, who was acting for Boynton; but was intended to be a joint note of all the parties either as signers or indorsers, and not to be delivered to Boynton until completed."

Upon the whole evidence the master finds that the last note, being the one declared on in the action at law, was a renewal of the note paid by Boynton, and that all the notes subsequent to the first "were for the original amount plus interest." No stock ever was sold although Briggs and Gould made some effort to sell. The only evidence of the value of the stock was that before the first agreement it had sold at forty cents a share.

The master at the request of the plaintiff in the bill further found that the evidence disclosed no explanation why Gould did not sign this last note; that this note was "simply a method of the renewal of the pre-existing obligation of all parties," that Briggs never received any money or any consideration whatever from Boynton, that the whole transaction was a joint and several

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undertaking between the four persons for the purchase of the stock, in which each was bound to contribute one fourth of the purchase money and to share equally in the profits, that each of the parties to the transaction should pay in the final adjustment between them one fourth of the amount of the money raised for the purchase of the stock, that there is no other consideration for the notes than the transaction as to the stock and that upon the evidence "there has been no forfeiture to . . . Briggs in said stock so far as said stock being sold and the proceeds applied to the payment of the note declared on."

Briefly stated the scheme was a joint enterprise to buy this stock, profits and losses to be shared equally. The money for the purchase was raised by a note upon which all put their names and which was secured by collateral owned by Boynton. Boynton paid this note at maturity thus releasing his collateral. He never was reimbursed in cash, but by notes which as they came due were renewed and which as between the parties were intended to be binding only for the sums representing the share of each for the purchase money, namely, each one quarter. And this scheme, so far as respects the personal liability on the notes no matter how the names appeared thereon, never was changed. It follows that the only liability of Briggs on the note would be the amount of his one quarter.

But what about the stock? The master is right in saying that Gould holds it subject to the agreements above named. The first agreement is superseded by the second, but the latter is to be interpreted in the light of the circumstances under which it was made, and among those circumstances are the first written agreement and the rights of the parties thereunder. The first agreement is very clear. All were equally interested in the stock, the note was to be a first charge upon the stock, and the balance after the payment of the note was to be equally divided. At the time of the second agreement no stock had been sold. Lane and Briggs had failed to make good their guarantee to sell stock enough to pay the note. Boynton was the only person who had advanced any money, and he had advanced the whole purchase price. He was entitled in equity to be reimbursed by a sale of the stock and, if the stock was insufficient to pay the note, to receive from each of his associates one quarter of the balance. He already had

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taken one note from his associates and was about to take another. Under these circumstances the second agreement was made. Under it Lane and Briggs still agree to sell stock enough to pay the note. Substantially the only difference between the two agreements is that the latter contains a forfeiture clause reading as follows: "It is also expressly agreed that the failure on the part of said Lane or Briggs to make the sale of stock as above stated — within ninety (90) days — they shall each forfeit all their right in equity to interest of any kind to any part of said fourteen thousand (14,000) shares of the stock above mentioned."

What was to be forfeited? Was it simply the right of Lane and Briggs to share in the division of the stock remaining after the sale of enough to pay the note, or did it include also their right to have the stock first applied to the payment of the note? If only the first, then Briggs has the right to have the proceeds of the sale of the stock applied to the payment of the note, and is answerable only for one fourth of any unpaid balance.

The master has found that the true meaning of the forfeiture clause is that while Briggs has lost his right to share in the stock remaining after the payment of the note he still has the right to insist upon the sale of enough stock to pay the note. The question is close, but on the whole we are inclined to take that view. As to the effect of the agreement Briggs has lost all right to any profit and still is held accountable for his share of any loss.

There should be a decree providing that the stock or enough of it shall be sold to pay the note, and that the plaintiff shall be held answerable only for his share of the balance unpaid, if any there be; that meanwhile and until the further order of the court, Gould shall be enjoined from conveying any stock except for the purpose of such sale, and that Boynton be enjoined from further prosecuting his action at law, until the further order of the court.

Decree accordingly.

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BRIDGET CAMPBELL *vs.* SARAH C. LIMA & others.

Bristol. February 27, 1912. — May 23, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Undue Influence. Deed, Validity.

In a suit in equity brought in the name of an aged woman by the conservator of her estate to set aside a deed of real estate and a bill of sale of personal property executed by the plaintiff when she was more than seventy-five years of age to the defendant, who was one of her two daughters, and alleged to have been procured by the undue influence of the defendant, where the evidence was contradictory and the testimony of the defendant could have been found to be contradictory and unsatisfactory, a finding of the trial judge, that the plaintiff was in a weakened state of mind and body and executed the deed and bill of sale by reason of the dominance and undue influence of the defendant, was sustained on the ground that, whichever way the judge had decided the case, it could not be said that his decision was plainly wrong.

MORTON, J. This is a bill in equity brought in the name of the plaintiff by the conservator of her estate to set aside a deed of real estate and a bill of sale of personal property made by her to the defendant Sarah C. Lima. The case was heard in the Superior Court. A commissioner was appointed to take the evidence and the evidence is all before us. The judge* who heard the case filed a memorandum of his findings. A part of it is as follows: "I do not find, that, at the time of the execution and delivery of the deed, or of the bill of sale, the plaintiff was of unsound mind or memory, or that any false representations were made to her as to the nature or contents of the instruments, or that physical violence or threats were then used to secure her signature. I find, however, that she was at the time in a weakened state of mind and body, common with one of her years (over seventy-five), and that she executed the deed and bill by reason of the dominance and undue influence of the defendant Lima." A decree was entered in favor of the plaintiff and the defendant Lima appealed.

The deed in question is the same one that was before this court for construction in *Lima* v. *Cook,* 197 Mass. 11. In that case,

* *Dana,* J.

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however, the question at issue was entirely different from that now presented.

Whether the deed and bill of sale were procured by fraud and undue influence was wholly a question of fact for the determination of the trial judge, and his finding will not be set aside unless clearly erroneous. *Flagg* v. *Phillips*, 201 Mass. 216. *Blossom* v. *Negus*, 182 Mass. 515. The case was heard at length and the evidence was contradictory in regard to the issue that was presented. The plaintiff was a witness and her testimony, so far as it went, was in favor of the defendant Lima. Both parties agreed in thinking, however, that her mind was at the time of the trial in a weakened condition. But her deposition had been taken in 1906, a few months after the conveyances in question, when she was sane, and in that she declared that she gave the property to Mrs. Lima of her own will and because she wanted her to have it, and would have given her more if she had had it, that she had been good and kind to her and never had abused her or threatened her with violence, that since her husband's death she had always taken care of her, and that her other daughter, Mrs. O'Connor, never had done anything for her and had tried to get all she could. Her statements in regard to the relations between her and Mrs. Lima and Mrs. Lima's husband were corroborated by other witnesses. There was also evidence tending to show that Mrs. O'Connor received $4,000 from her father before he died; that the plaintiff had given her husband $1,000 about the repayment of which there was a question, and also a saloon property valued at several thousand dollars; and that Mr. O'Connor was the only son and heir of his mother, a widow, reputed to be worth $50,000 or $60,000. There was no evidence that Mrs. Lima had received anything beyond her share of her father's estate, and no direct evidence that undue influence was exercised by her upon her mother. On the other hand there was evidence that she had threatened the plaintiff with violence and had assaulted her, that the plaintiff had said that she was afraid of her, that she exercised dominance over the plaintiff, that she had said that if the plaintiff made a will she would make it for her, that her habits had caused the plaintiff distress, and that less than a year before the date of the deed in question the plaintiff had made a will in which she had given one half of her property to her daughter Margaret, Mrs. O'Connor,

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and the other half in trust for Mrs. Lima for life with a limitation over to Mrs. O'Connor. Mrs. Lima was a witness and it could have been found that her testimony was contradictory and unsatisfactory.

What we have said shows that the case was one which had two sides to it and that, whichever way the judge who heard it decided it, it could not be said that his decision was plainly wrong.

It was for the trial judge to say, taking into account the plaintiff's age and her general condition of health, her mental constitution and her dependence upon some one for care and attention, whether she could or could not be unduly influenced. It would not follow that if she was of sound mind she could not be subjected to undue influence.

It follows that the decree must be affirmed.

So ordered.

The case was submitted on briefs.

J. T. Coughlin & F. N. Nay, for the defendant Lima.

J. W. Cummings & C. R. Cummings, for the plaintiff.

JOSEPH GOLDBERG *vs.* BOSTON ELEVATED RAILWAY COMPANY.

LOUIS GOLDBERG *vs.* SAME.

Suffolk. March 8, 1912. — May 23, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Street railway, In use of highway.

In an action against a corporation operating a street railway for personal injuries, there was evidence that the plaintiff, who was a little more than ten years of age and of average intelligence, was crossing a street on which there were parallel tracks of the defendant over which he knew that cars frequently were passing in each direction, that above the tracks was a structure for elevated trains, that it was about eight o'clock on an evening in April more than a hour after sunset and was not very dark, that the plaintiff passed behind a car on the nearer track, looked around that car and saw no car coming on the farther track, that he went upon that track and, when he nearly had crossed it, was struck by a car moving rather rapidly on which there was no light and on which no gong was sounded. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury.

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TWO ACTIONS OF TORT, the first by a boy, ten years and four months of age when injured, for personal injuries sustained on the evening of April 10, 1909, when the plaintiff was crossing Washington Street in Boston upon a cross walk at its intersection with Thorndike Street, and the second action by the father of the plaintiff in the first for loss suffered by reason of his injuries. Writs dated respectively April 28 and June 11, 1909.

In the Superior Court the cases were tried together before *Dubuque*, J., who refused to order verdicts for the defendant and submitted the cases to the jury. The jury returned verdicts for the plaintiffs, in the first case in the sum of $900 and in the second case in the sum of $40. The defendant alleged exceptions.

C. Brewer, for the defendant.

J. J. Mansfield, for the plaintiffs.

SHELDON, J. It is conceded that there was evidence of negligence for which the defendant was responsible. The right of each plaintiff to recover depends therefore upon the question whether the jury were warranted in finding that Joseph Goldberg was in the exercise of due care.

He was a boy of a little more than ten years of age and was then of average intelligence. He undertook to cross Washington Street in Boston, where the defendant operated two tracks of its electric railway, and cars were frequently passing thereon in each direction, as he knew. It was about eight o'clock in the evening. He passed behind one car, on the track nearer to the sidewalk which he had left, looked around that car but saw no car coming on the farther track, went upon that track and was hit by a car coming thereon. There was no light upon that car and no gong was sounded upon it, but the street was unobstructed.

If these were all the facts, and if the accident had happened in daylight and there had been nothing to interfere with his view of the approaching car, it would be difficult to say that he could be found to have acted with the due regard for his own safety which is to be expected even from one of his tender age. *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562. *Holian* v. *Boston Elevated Railway*, 194 Mass. 74. *Casey* v. *Boston Elevated Railway*, 197 Mass. 440. But it was more than an hour after sunset, and the defendant's elevated structure must have tended more or less to darken that part of the street upon which the surface tracks

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were laid. How far this was remedied by the fact that it was not very dark, was for the jury to say. He had nearly crossed the farther track when he was hit. The car that hit him was moving rather rapidly.

We have taken on these matters the view of the evidence which is most favorable to the plaintiff, as upon these exceptions we are bound to do. And it was for the jury to determine the effect of any inconsistencies in his testimony. *Picquett* v. *Wellington-Wild Coal Co.* 200 Mass. 470, 473. *Doon* v. *Felton*, 203 Mass. 267, 270. On the whole case, as was said in *Sellon* v. *Boston Elevated Railway*, 208 Mass. 507, 509: "It does not quite appear to be impossible to reach any other rational conclusion than that the plaintiff was careless." And see *Purtell* v. *Jordan*, 156 Mass. 573, 577; *Magner* v. *Boston Elevated Railway*, 209 Mass. 60; *Berry* v. *Newton & Boston Street Railway*, 209 Mass. 100; *Purcell* v. *Boston Elevated Railway*, 211 Mass. 79. The exceptions must be overruled.

So ordered.

GUILLAUME MERCIER *vs.* BOOTT MILLS.

Middlesex. March 11, 1912. — May 23, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Evidence, Presumptions and burden of proof.

Where, at the trial of an action for personal injuries, the plaintiff testifies through an interpreter and his testimony is confused and sometimes scarcely intelligible and the jury might find him to be an ignorant and unintelligent man, if some parts of his testimony, taken in connection with other evidence, tend to show that he was in the exercise of due care when injured and that his injuries were due to negligence of the defendant, the case should be submitted to the jury.

TORT at common law for personal injuries suffered by the plaintiff while in the employ of the defendant and operating an elevator in its mill in Lowell, and alleged to have been due to a defective and unsafe condition of the elevator. Writ dated July 15, 1910.

In the Superior Court the case was tried before *Morton*, J. The material facts are stated in the opinion. At the close of the

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plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. V. Charbonneau, for the plaintiff.

F. E. Dunbar, (*J. J. Rogers* with him,) for the defendant.

SHELDON, J. It would be of no advantage to recapitulate the evidence in this case. The testimony of the plaintiff was confused and sometimes scarcely intelligible; and if some parts of it were to be accepted to the exclusion of others, it would appear that his injury was due merely to his having allowed some part of his body to protrude beyond the lines of the elevator which he was running, and not to any negligence of the defendant. *McDonald* v. *Dutton*, 198 Mass. 398. The statements made by the plaintiff to Moran at the hospital tend to the same conclusion. But other parts of his testimony, taken in connection with the plan which was in evidence, would indicate that there was a sudden jar or jerk of the elevator due to the fact that the points of the iron rods which should have engaged the opening of the trap doors in the fourth floor of the building did not strike these doors rightly by reason of the irregular motion of the elevator, that this failure of the points to engage rightly the centre of the trap doors and to open them properly was due to some defective construction or lack of repair of the apparatus, and that in consequence of the sudden jar thus caused the plaintiff was thrown down and injured. It must be borne in mind that the plaintiff's testimony was given through an interpreter, that the jury could have found him to be an ignorant and unintelligent man, and that it was for them to determine the effect of any inconsistencies in what he said, especially in his cross-examination, and to penetrate his meaning where that was obscure. *Doolan* v. *Pocasset Manuf. Co.* 200 Mass. 200, 203. *Picquett* v. *Wellington-Wild Coal Co.* 200 Mass. 470, 473. *Doon* v. *Felton*, 203 Mass. 267, 270. *Donovan* v. *Chase-Shawmut Co.* 205 Mass. 248, 253. *Lury* v. *New York, New Haven, & Hartford Railroad*, 205 Mass. 540, 546. Taking the most favorable view for the plaintiff, we cannot say that there might not have been a finding that his injury was due to a defective condition of the elevator.

There was evidence that this was an old elevator, that there had been difficulty in the doors opening when it went down, that the wheels and rolls were in bad condition, and that the pulley on the

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fourth floor had failed to work. Also there was evidence that if the points of the iron rods did not strike between the trap doors, this would tend to produce a jar or jerk such as could be found to have caused the plaintiff's injury.

The plaintiff could be found to have been in the exercise of due care.

While on the evidence reported it could have been contended that he had failed to make out a case, and a verdict for the defendant reasonably might have been anticipated, yet the case should have been submitted to the jury. *Moylan* v. *D. S. McDonald Co.* 188 Mass. 499. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580.

Exceptions sustained.

RUDOLPH CHETTEVILLE *vs.* SEARS H. GRANT.

Suffolk. March 13, 1912. — May 23, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant, Termination of lease. *Attachment. Trespass. Officer.*

Where a lease provides in substance that, upon a breach of any of its covenants by the lessee, the lessor immediately and without demand or notice may enter upon the premises, dispossess the lessee and terminate the lease, a lessor has a right both to bring an action against the lessee for arrears of rent in which an attachment is made of personal property upon the leased premises, and also to enter upon the premises, dispossess the lessee and terminate the lease while the constable is upon the premises and in charge of personal property of the lessee under the writ of attachment; and the constable, if authorized so to do by the lessor, after the dispossession may prevent the lessee from entering the premises except for the removal of property exempt from attachment.

Under a writ of attachment in an action of contract against the proprietor of a tailoring business conducted in two rooms, each connected with a corridor, one room being used as a workroom by the employees of the establishment and the other for dealing with customers, a constable has no right against the wishes of the defendant to place a lock upon the door leading from the corridor into the workroom and to keep the defendant and his employees from using that door.

TORT against a constable for alleged unlawful acts in attaching property of the plaintiff. Writ in the Municipal Court of the City of Boston dated December 14, 1908.

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On appeal to the Superior Court the case was tried before *Fox*, J.

It appeared that at the time of the alleged unlawful acts of the defendant the plaintiff was conducting the business of "ladies tailoring" in two rooms leased to him by one Stone, the lease containing a provision, "that if the lessee or his executors, administrators or assigns do or shall neglect or fail to perform or observe any of the covenants contained in these presents, and on his or their part to be performed or observed . . . the lessor, or his heirs or assigns, lawfully may, immediately, or at any time thereafter, and without demand or notice, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of their former estate, and expel the lessee and those claiming through or under him and remove their effects (forcibly, if necessary) . . . and upon entry as aforesaid this lease shall determine." A rear room was fitted up as a workroom and contained benches, machines and other implements and tools incidental to the plaintiff's business, and a front room was used as a reception and show room for customers. There was an entrance leading from the rear room into the corridor, which was used exclusively by the plaintiff's employees, and an entrance from the corridor into the front room. In the workroom were several garments belonging to customers, on which the plaintiff had no claim for labor or material. The larger part of the furniture in the front room was held by the plaintiff under contracts of conditional sale, but some of the articles, such as pictures and other small articles, belonged to him, as did the tools and implements in the rear room.

The plaintiff becoming in arrears in the payment of rent, Stone brought an action against him and the writ was given to the defendant for attachment and service. The defendant went to the plaintiff's place of business and placed a keeper in charge on December 10, 1908. There was evidence that the defendant at once put a lock on the door of the rear room and prevented the plaintiff and his employees from using that door. On December 12, while the defendant still was in possession of the premises under the writ of attachment, Stone took possession of the premises for breach of covenants in the lease and left the defendant in charge of the premises on his behalf, and thereafter the defendant pre-

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vented the plaintiff from using the premises except that he permitted the removal of tools and implements of trade.

Other facts are stated in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. Hirsh, for the plaintiff.

A. F. Tupper, for the defendant.

SHELDON, J. There was no evidence to show what specific property of the plaintiff was attached by the defendant. Of the goods of the plaintiff in the rooms occupied by him as a place of business, some were and some were not exempt from attachment. There was nothing to indicate that the defendant interfered with any of the former goods, and it cannot be presumed that he did so.

Upon the testimony of both parties it appeared that the plaintiff voluntarily surrendered his keys to the defendant, and assented to the defendant's remaining through his keeper in possession of the attached property upon the plaintiff's premises. Certainly the plaintiff made no request for the removal of the keeper or of the property attached under R. L. c. 167, §§ 43, 44.

So far as appears the entry of Stone, the plaintiff's landlord, to take possession of the premises for non-payment of rent was lawful. *Fifty Associates* v. *Howland*, 5 Cush. 214. *Hall* v. *Middleby*, 197 Mass. 485, 489. *Gunsenhiser* v. *Binder*, 206 Mass. 434. There is nothing contrary to this in *Desseau* v. *Holmes*, 187 Mass. 486, or *Fifty Associates* v. *Howland*, 11 Met. 99, relied on by the plaintiff. The defendant did nothing unlawful or in violation of the plaintiff's rights in regard to this.

The action cannot be maintained on any of these grounds.

But there was evidence that the defendant put a lock on the rear door of the plaintiff's rooms and prevented the plaintiff and his servants from using that door. If, as might have been found, this was without the plaintiff's assent, it was a wrongful act and entitled the plaintiff to maintain his action. *Walsh* v. *Brown*, 194 Mass. 317. *Morrin* v. *Manning*, 205 Mass. 205. It follows that the verdict for the defendant ought not to have been directed, and for this reason alone the order must be

Exceptions sustained.

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MASSACHUSETTS GENERAL HOSPITAL *vs.* CITY OF BOSTON.

Suffolk. March 14, 1912. — May 23, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Tax, Exemption. *Charity. Devise and Legacy.*

Where by the residuary clause of a will real estate and personal property are given to a city to constitute a fund, the income of which is to be applied to the maintenance and improvement of a common and parks, and the city by an order of its council accepts the gift and appoints the city treasurer to receive the property, the title of the real estate passes to the city without any formal tender or conveyance to the treasurer or the city; and therefore after the order of the council and so long as the city retains the property under the will, no tax can be assessed upon it. Following *Burr* v. *Boston*, 208 Mass. 537.

Where a city, which owns certain real estate that was given to it by a will to form a fund for a public charitable purpose, unlawfully assesses a tax thereon to the "devisees" of the testator and then sells the real estate, the purchaser cannot be compelled to pay the tax, although in the agreement for the sale was the provision, "Rents, taxes and insurance are to be adjusted as of the day of the delivery of the deeds," and the deed stated that the conveyance was "subject to taxes for the current year."

In determining the validity of a tax assessed by the city of Boston upon property which it had received and was holding as the residuary legatee and devisee under a will for public charitable purposes, *it was stated* that neither in *Burr* v. *Boston*, 208 Mass. 537, nor in the present case had this court considered whether real estate situated in other towns and included in the same devise to the city was liable to taxation in those towns.

CONTRACT for $2,564.10 paid under protest as a tax assessed on May 1, 1909. Writ dated June 6, 1910.

In the Superior Court the case was heard by *Hitchcock*, J., upon an agreed statement of facts.

It appeared that the property upon which the tax in question was assessed included several parcels which passed under the first codicil of the will of George F. Parkman, late of Boston, who died on September 16, 1908, giving the residue of the estate to the defendant to constitute a fund, the income of which was to be applied to the maintenance and improvement of the Common and parks of Boston.

On March 9, 1909, the defendant's city council adopted an order, which the mayor approved, accepting the devise and au-

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thorizing the city treasurer, "on behalf of the city, to receive and receipt for said bequest, convert the same into money, and invest and reinvest it in proper securities, and hold the same to be expended for the purposes and objects named in said bequest."

The executor of the will of George F. Parkman never made any formal tender to the treasurer of the property devised, and until after May 1, 1909, he collected rents accruing from all the real estate included in the devise. He made payment of some of the income so received to the defendant's treasurer.

On May 1, 1909, the tax in question was assessed to "the devisees of George F. Parkman."

On June 14, 1909, an agreement in writing was made between the plaintiff, the defendant and the executor of the will of George F. Parkman, for the sale for $200,000 by the defendant and the executor to the plaintiff of the property in question. This agreement contained the provision, "Rents, taxes and insurance are to be adjusted as of the day of the delivery of the deeds."

On July 14, 1909, two deeds were delivered to the plaintiff, one from the executor and the other from the defendant, each of which contained the statement that the premises were conveyed "subject to taxes for the current year." The next day the defendant's treasurer received from the executor who conducted the negotiations a letter enclosing $197,298.53, which represented the purchase price, $200,000, less the broker's commission, which the defendant had agreed to pay, and a deduction for a sewer assessment. The letter stated, "The rents and water rates were apportioned and will be accounted for by" the executor's assistant "in due course." The treasurer signed an acknowledgment of the receipt of the money as "net proceeds of the sale . . . in pursuance of" the agreement of June 14, 1909.

The judge found for the plaintiff and reported the case for determination by this court, "such judgment to be entered as justice may require."

The case was submitted on briefs.

J. Abbott, for the plaintiff.

T. M. Babson, for the defendant.

SHELDON, J. This case is governed by *Burr* v. *Boston*, 208 Mass. 537. As was said there, the city had unconditionally accepted Mr. Parkman's devise on the terms on which it was made. The

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authority given by the city to its treasurer to receive and hold the property was merely its designation of the officer who was to have charge thereof. The title was not in the executor, but in the city. If the executor was allowed to manage the property, to collect the rents and profits and mingle these with other funds for which he was afterwards to account, this in no way affected the legal title or the property rights of the city. *Towle* v. *Swasey*, 106 Mass. 100, 107.

The plaintiff's agreement of purchase stipulated that "rents, taxes and insurance . . . [were] . . . to be adjusted as of the day of the delivery of the deeds." This did not import a promise by the plaintiff to pay in full or in part taxes which had not been and could not be assessed lawfully upon the property and which did not constitute a lien thereon. The provision in the deed that the conveyance was "subject to taxes for the current year" has no broader meaning. There were no taxes for the current year to which the property was subject. *Campbell* v. *Haven*, 211 Mass. 121.

If, as the defendant has argued, the plaintiff has not paid in full the price which it agreed to pay, yet that fact raises no question to be considered in this case. There has been no claim of a set-off, and we need not consider whether such a claim could have been maintained.

It may be added, as that question has been suggested by the defendant, that neither in *Burr* v. *Boston*, *ubi supra*, nor in the present case, has the court considered whether real estate situated in other towns and included in Mr. Parkman's devise to the defendant is liable to taxation in those towns.

Judgment must be entered for the plaintiff on the finding.

So ordered.

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BOSTON CLUB v. HENRY S. POTTER, JR.

Suffolk. March 15, 1912. — May 23, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Corporation, Social club, By-laws. *Contract*. *Practice, Civil*, Special findings by jury.

Where the by-laws of a social club incorporated under R. L. c. 125 provide that, if a member's "written resignation be delivered to the secretary on or before" a certain date, such member "shall not be liable for the annual dues of the next year," a resignation not received by the secretary is of no effect although it may have been delivered seasonably to some other officer or agent of the club.

The by-laws of a social club incorporated under R. L. c. 125 constitute in effect a contract between the different members and the corporation.

The by-laws of a social club incorporated under R. L. c. 125 provided that the "fiscal year" should terminate on November 30; that each member should pay "an annual assessment of $50;" that the "dues" were "payable quarterly in advance . . . but any member who so" desired could "pay the whole annual assessment in advance," and that "any member who" was "not at the time indebted to the club" might "send to the secretary his written resignation and upon acceptance thereof by the executive committee he" should "cease to be a member." A member, who had paid his dues to and including November 30 of a certain year, without making any further payment sent to the secretary of the club a resignation in writing on December 9. *Held*, that the resignation was of no effect to relieve him from liability for the dues which had accrued on December 1, because the by-law allowed resignation under such circumstances only if the resigning member was not indebted to the club when his resignation was tendered.

Where by the by-laws of a social club incorporated under R. L. c. 125 annual dues become due on December 1, and are "payable quarterly in advance," the facts, that on a May 5 the property of the club is placed in the hands of a receiver by order of the Superior Court and that the members are deprived of some of the benefits of membership, do not exempt members from liability for dues for the entire year which began on the preceding December 1.

Under a by-law of a social club incorporated under R. L. c. 125 which provides that, "upon failure" of a member "to pay [his club dues] within two months after they become due [such member] shall cease to be a member of the club," mere failure of a member to pay an annual assessment within two months after it becomes due does not cause his membership to cease so as to exempt him from liability for the year's dues.

Where at the trial of an action of contract the presiding judge submits several special questions to the jury, some of which are immaterial, and on the answers of the jury to those of the questions which are material the judge correctly orders a verdict for the plaintiff, exceptions by the defendant will not be sus-

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tained merely because it appears that an answer of the jury to one of the immaterial questions may have been inconsistent with their answers to others of the immaterial questions.

CONTRACT for $50 alleged to be owed by the defendant as club dues for the year beginning December 1, 1907. The action was brought in the name of the plaintiff, a social club incorporated under R. L. c. 125, by Oscar A. Marden, Esquire, who was appointed receiver of its property by a decree of the Superior Court on May 5, 1908. Writ dated May 13, 1910.

In the Superior Court the case was tried before *Lawton*, J.

From the evidence and the findings of the jury in answer to special questions submitted to them by the judge, it appeared that the defendant was a member of the plaintiff on January 1, 1907, and that at that time and when he became a member the following by-laws were in force:

"Article IV, Sect. 4. Each resident member shall pay an entrance fee of $50 when elected, and an annual assessment of $50. Each non-resident member shall pay an entrance fee of $25 when elected, and an annual assessment of $25.

"Sect. 5. Every member shall within thirty days after his election pay to the treasurer his entrance fee, and his membership shall commence from the date he complies with the above requirement, and will be equivalent to signing the constitution and by-laws.

"The dues are payable quarterly in advance on the first day of March, June, September and December, but any member who so desires can pay the whole annual assessment in advance.

"A member elected after the first day of March, June, September or December shall only be required to pay his proportion of the quarterly dues computed from the first of the month following his election.

"Any member failing to pay his dues within thirty days after they become due shall be posted on the bulletin board and notice thereof be mailed to his usual address by the treasurer, and upon failure to pay within two months after they become due shall cease to be a member of the club.

"Article VI, Sect. 7. The fiscal year shall terminate on the thirtieth day of November in each year, and the books shall be closed at midnight on that day.

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"Article VII, Sect. 6. Any member who is not at the time indebted to the club may send to the secretary his written resignation and upon acceptance thereof by the executive committee, he shall cease to be a member; and, if his written resignation be delivered to the secretary on or before the thirtieth day of November or the thirty-first day of May in any year, he shall not be liable for the annual dues of the next year."

On or about January 8, 1907, the defendant prepared and mailed to the plaintiff a resignation from the club, which was received by some officer or agent of the club other than the secretary, but never was received by the secretary.

At the close of the evidence the defendant asked for the following rulings, which were refused:

"1. On the answers of the jury to the questions submitted to them and on the agreed facts, the verdict must be for the defendant.

"2. The consideration for the dues for which this suit is brought failed when the club house of the plaintiff was closed and no recovery can be had for any proportion of the dues after that date.

"3. Sixty days after December 1, 1907, the defendant ceased to be a member of the Boston Club by reason of failure to pay his dues, if he were such member on December 1, 1907, and no liability for dues after February 1, 1908, can be enforced.

"4. The obligation of the defendant to pay dues was not an obligation for $50, beginning on December 1, 1907, but only for $12.50, the first quarter's dues, and this obligation was never for more than one quarter's dues at a time; in other words, it was a quarterly and not an annual obligation."

Special questions were submitted to the jury by the judge. The facts found in answer to those of the questions that were material are stated in the opinion. Those of the questions and answers, which are held by the court to have been immaterial, were as follows:

"3. Did the Boston Club, or any of its officers or agents other than the secretary, receive a resignation from the defendant on or about January 8, 1907? — Yes."

"6. Did the plaintiff, by its conduct and its votes, construe its by-laws, or adopt as their meaning, that failure of a member to pay his dues for sixty days after they became due, *ipso facto* and

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without any further action on the part of the officers of the club, terminated the membership of such delinquent member ? — Yes.

"7. Did the members of the Boston Club understand and acquiesce in the construction of its by-laws that failure to pay dues within sixty days after they became due, *ipso facto* and without any further action on the part of the officers of the club, terminated membership therein ? — Yes.

"8. Did the plaintiff, by its conduct and its votes, construe its by-laws, or adopt as their meaning, that a member could be dropped from membership for failure to pay dues within sixty days after they became due, only by a vote of the executive committee? — Yes."

On the answers of the jury to the questions specially submitted to them, the judge ordered a verdict for the plaintiff; and the defendant alleged exceptions.

H. T. Richardson & G. A. Sweetser, for the defendant.

C. M. Ambrose, for the plaintiff.

SHELDON, J. The plaintiff's right to recover depends upon whether the defendant was one of its members and was liable for dues on December 1, 1907. He had been such a member, but he claimed that he had resigned his membership on January 8, 1907, and that his resignation had taken effect on or before November 30, of that year.

His letter of resignation, though seasonably delivered to some clerk or other officer or agent of the plaintiff, was not received by its secretary or passed upon by its executive committee. Therefore it never took effect under Article VII, Sect. 6, of the by-laws. Resignation, with a cessation of further liability for membership dues, was a privilege of the member, and to avail himself of it he must comply with the terms of the by-law creating the privilege. *Raggett* v. *Bishop*, 2 C. & P. 343. *Building Trades Club* v. *Hausling*, 26 Misc. N. Y. 746, and 56 N. Y. Supp. 1056. The by-laws constituted in effect a contract between the different members and the corporation. *Flint* v. *Pierce*, 99 Mass. 68, 70. *Dolan* v. *Court Good Samaritan*, 128 Mass. 437. In *Finch* v. *Oake*, [1896] 1 Ch. 409, 415, and 73 L. T. (N. S.) 716, and *People* v. *New York Motor Boat Club*, 129 N. Y. Supp. 365, the resignation had been received by the proper officer, and in the first named of those cases this was treated by Lindley, L. J., as the decisive point.

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The defendant's resignation of December 9, 1907, cannot avail him because he then owed the club for the dues which had accrued on December 1 of that year. It was only a member not then indebted to the club who could send to the secretary a written resignation. This was the provision of Article VII., Sect. 6, of the by-laws. *Westchester Golf Club* v. *Pinkney*, 43 Misc. N. Y. 338, and 87 N. Y. Supp. 153.

The appointment of the receiver and the closing of the club house, depriving the defendant of some of the benefits of membership, furnish no defense to the action. His liability for the annual dues was fixed on December 1; it was a liability for the whole amount thereof, though he could liquidate it in quarterly payments. The subsequent instalments were *debitum in præsenti, solvendum in futuro*. *Rogers* v. *Boston Club*, 205 Mass. 261, 269. *Freedman* v. *Chamberlain*, 70 Hun, 193.

Nor did his membership cease *ipso facto* on February 1, 1908, under the last clause of Article IV., Sect. 5, of the by-laws, because of his failure to pay his dues within two months from December 1, 1907, so as to relieve him from further liability for those dues. He could not by his own failure terminate the responsibility which he had assumed, though the club might have done so. *Gray* v. *Christian Society*, 137 Mass. 329. *Medical & Surgical Society of Montgomery County* v. *Weatherly*, 75 Ala. 248. *Plattdeutsche Grot Gilde* v. *Ross*, 117 Ill. App. 247.

As no resignation by him ever took effect, we need not consider whether, if this had been otherwise, his liability would have been limited in amount by the provisions of Article VII., Sect. 6, of the by-laws.

The third special finding of the jury is not material. It was of no consequence that the defendant's resignation came to some agent of the plaintiff, such as a clerk at its office, if that resignation did not reach the necessary officer. Nor are the sixth, seventh and eighth findings material. It does not matter whether the eighth finding can be reconciled with the others, or, if they cannot be reconciled, what the effect of the inconsistency would be.

The judge acted rightly in refusing the defendant's requests for rulings and in ordering a verdict for the plaintiff.

Judgment on the verdict.

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ELLEN CONETON *vs.* OLD COLONY STREET RAILWAY COMPANY.

Norfolk. March 25, 1912. — May 23, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Street railway. *Evidence*, Materiality.

At the trial of an action for personal injuries against a street railway company by one who was thrown down by the starting of a car as he was attempting to alight, there was evidence tending to show that the defendant at the place of the accident maintained a single track with a turnout and a signal box, that it was the duty of the motorman to stop the car on the turnout and of the conductor to leave the car and change the signal, that there was no white post or other indication that it was a regular stopping place for cars, but that passengers had alighted from and entered cars at that point; that when the car stopped on the occasion in question the conductor left it to change the signal and the plaintiff was attempting to alight when, before the conductor returned, the motorman started the car and the plaintiff was thrown down. There was no evidence that either the motorman or the conductor knew that the plaintiff was attempting or desired to alight. *Held*, that there was no evidence of negligence on the part of either the conductor or the motorman.

The mere fact that passengers are accustomed to alight from a steet car at a point near a town line, which is a fare limit, where there is not a regular stopping place for the cars for the reception and discharge of passengers, but where there is a switch and it is the duty of the conductor to leave the car to change a signal, does not impose upon the motorman the duty, before he starts the car in the absence of the conductor, of seeing that no passenger is attempting to alight.

At the trial of an action against a street railway company for personal injuries where it appeared that the plaintiff was thrown down by the starting of a car as he was attempting to leave it, that neither the conductor nor the motorman was informed or knew of the plaintiff's intention, that the conductor in the performance of his duties was absent from the car changing a signal, and that the car had stopped at a turnout near a town line which was a fare limit where passengers got on and off cars but where there was no white post or anything else to indicate a regular stopping place, evidence tending to show that at that point conductors were in the habit of calling out and announcing the limit of the car fare properly was excluded as immaterial, there having been no evidence that such an announcement was made on the occasion in question.

MORTON, J. This is an action of tort to recover for injuries sustained by the plaintiff while alighting from one of the defendant's cars at or near the division line between Quincy and Braintree. At the close of the plaintiff's evidence the presiding judge*

* *Wait*, J.

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directed a verdict for the defendant. The case comes here on the plaintiff's exceptions to the ruling thus made, and to the exclusion of certain evidence.

The accident happened on August 19, 1904, between 8 and 8.30 in the evening. The place where the plaintiff attempted to alight was on a switch or turnout near a signal box. It was the duty of the conductor to throw the signal, and the car came to a stop on the turnout to enable him to do so, and he left the car for that purpose. While the car was stopped and the conductor was at the signal box the plaintiff attempted to alight. She gave no notice to the conductor or the motorman that she wanted to get off the car at that place, and there was no evidence that either one knew or had reason to know of her intention or desire to alight. As she was getting off the motorman started up the car and she was thrown to the ground, receiving the injuries complained of. The line between Quincy and Braintree was a fare limit. The turnout was near the line and there was evidence that passengers got on and off the cars at that point. There was no white post there to indicate, if that is material, that it was a regular stopping place. The plaintiff offered to show that conductors had been in the habit of calling out and announcing the limit of the car fare, and that people had been accustomed to leave the car at the place where it stopped when the accident occurred. The judge excluded the evidence thus offered and the plaintiff duly excepted. There was no evidence tending to show that any such announcement had been made at the time of the accident. But as has been already stated, it appeared from other testimony in the case that passengers got on and off the car at the place where the accident occurred, and no harm was, therefore, done by the exclusion of the evidence that people were accustomed to leave the car at that place.

It is plain, we think, that there was no evidence of negligence on the part of the conductor. He did not know and had no reason to know that the plaintiff desired to get off the car, and if he did he gave no signal to start the car and did not in any way cause it to be started or contribute to the accident. Neither do we think that there was any evidence of negligence on the part of the motorman. He likewise did not know and had no reason to know when he started the car that the plaintiff was attempting to alight,

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or that she wished to alight. Although, as the plaintiff testified, the place was a stopping place, it was a stopping place of such a nature that those in charge of the car cannot be held to be to blame for starting the car while a passenger was alighting, in the absence of any signal from the passenger that he or she wished to alight or of any knowledge or reason to know that the passenger was attempting to alight or wished to alight. The mere fact that passengers were accustomed to alight at that place did not of itself without anything more impose upon the motorman the duty of seeing that none were attempting to alight when he started the car. He might well assume in the absence of notice to the contrary that no passenger was attempting to alight. *Spaulding* v. *Quincy & Boston Street Railway*, 184 Mass. 470. *Oddy* v. *West End Street Railway*, 178 Mass. 341. If neither the conductor nor the motorman was negligent in starting the car, the fact, if it was a fact, that it started with a "lurch" or "gave a lurch," as the plaintiff testified, would not help the plaintiff. The manner in which the car started could be material only in case the circumstances were such as to show that the conductor or motorman knew or had reason to know that she was attempting to alight or desired to alight and owed a duty to her not to injure her by an improper starting of the car.

Evidence that it was the custom or habit of conductors to announce or call the limit of the car fare was immaterial. There was, as already observed, no evidence of any such announcement or call on the evening in question, and it appeared independently of such evidence that passengers got on and off at the place where the car had stopped when the accident occurred.

Exceptions overruled.

J. W. McAnarney, (*T. F. McAnarney* with him,) for the plaintiff.

Asa P. French, (*J. S. Allen, Jr.*, with him,) for the defendant.

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GEORGE A. WILLIS *vs.* JAMES B. RICHARDSON & another, trustees.

Suffolk. December 12, 1911. — May 24, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Devise and Legacy.

A testator, who had nine grandchildren, by the terms of a clause of his will gave to trustees $1,000 for each grandchild living at his death, "to invest the same in some safe productive property," to pay the income to each of such grandchildren while under age and upon the arrival of each at the age of twenty-one years to pay over the principal. About two years after the execution of the will he made a codicil. Six of the nine grandchildren were of age or soon would be, including the oldest son of the testator's son C, then twenty-eight years of age. The other three grandchildren were children of the testator's son C and were much younger, the oldest of them being about eleven years of age. By the codicil the testator changed this clause of his will and gave $1,000 absolutely to each of the six older grandchildren, naming among them the oldest son of his son C. He then provided as follows: "The clause . . . in my will is amended in this codicil so that my . . . trustees are to receive $1,000 for each of the children of my son C, and invest the same as set forth in my will." *Held*, that the children of the testator's son C for whom these trusts were provided were the three youngest children of C, there being a manifest intention to exclude from the class the oldest son of C to whom an absolute legacy had been given and to whom the provision for a trust investment was not applicable.

APPEAL from a decree of the Probate Court for the county of Suffolk dismissing the petition of George A. Willis, filed on December 22, 1911, for the distribution to him of his alleged share of a trust fund as one of the children of Charles J. Willis under provisions of the will and codicil of Clement Willis, who died on June 20, 1889.

The appeal was heard by *Morton*, J., who reserved and reported it for determination by the full court. The facts material to the question of interpretation considered by this court are stated in the opinion.

F. W. Dallinger & A. P. Gay, (*J. L. Dyer* with them,) for the petitioner.

J. P. Richardson, for the respondents.

HAMMOND, J. In the codicil the following language is used, namely: "The clause in section 'Three,' in my will is amended in

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this Codicil so that my Executors and Trustees are to receive one thousand dollars for each of the children of my son Charles J. Willis, and invest the same as set forth in my will." At the time the codicil was executed the son Charles had four children, one, the petitioner, by his first wife, and three by his second wife; and all four survived the testator. And the question is whether the petitioner was intended to be included in the phrase "each of the children of my son Charles J. Willis."

It is necessary to recur to the circumstances under which the will and codicil were respectively made. The will was made on February 24, 1886. After various bequests to his children and other relatives, the testator gives the residue of the estate in trust, the income to be paid to his children, and after their decease the principal to be divided equally among his grandchildren. The third clause so far as material to this case reads thus: "I give to my Trustees as many thousand dollars as I shall have grandchildren at my decease, that is one thousand dollars to each grandchild, in trust, to invest the same in some safe productive property, and the income of the said fund to be paid over and distributed in equal shares as often as once in six months to and among such grandchildren as may remain under age, or to the natural guardian of such of them as at the time of such distribution by reason of age or otherwise might not make good use of the money. The share of income which shall be so paid to said guardians is to be used by them for the wards in such manner as they shall think best, and upon the arrival of each of my said grandchildren at the age of twenty-one years or previous marriage, if females, his or her share of said trust fund, as it then stands, is to be paid over to them respectively for their own use, the share of married females as their separate property and in case of any of my grandchildren before becoming of age and entitled to receive his or her share, is upon said decease of any of my grandchildren to be paid to their heirs at law."

At this time there were nine grandchildren, all of whom survived the testator. Of these nine grandchildren it appears from the record in connection with the genealogical chart contained in the respondents' brief, which was used without objection in the argument before us, that four, including the petitioner, were of age, their ages varying from twenty-three to thirty-three years. One

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was about eighteen, one seventeen, and three, the children of Charles by his second wife, were much younger, the eldest being only nine years old. Inasmuch as the legatees under this clause were to be only the grandchildren who should survive the testator, it is manifest that it could not be known whether any of those survivors would be of age at the time of the testator's decease; and hence undoubtedly the provisions as to the payment of the income to those who should not then be of age. These provisions of course were not intended to be applicable to those who at the death of the testator should be of age. Such would be entitled to receive their legacies in the due course of the settlement of the estate, as in the case of any unrestricted legacy.

On November 14, 1888, nearly one and three-fourths years after the making of the will, the codicil was made. By it the testator confirms the will so far as the "codicil is consistent therewith," and after changing in some respects the provisions made in the will for his children and making some bequests to certain grandchildren by name, he proceeds to consider the third clause of his will. The nine grandchildren were all still living. They were all of age or very near it, with the exception of the three youngest children of his son Charles, and with that exception would be entitled to their legacies shortly after his death, even if it should soon occur. Under these circumstances he concludes to change this third clause. He provides that the bequest of $1,000 shall go at once to each of the six older grandchildren, including the petitioner. But there still remain the three young children of his son Charles, who were included in clause three of the will. If he leaves them to their chance under that clause, then their right to the legacy would depend, as did that of all the others before the change which he has just made in their favor, upon the fact of survivorship. He had made all the other legacies absolute. He wants to have the three children stand like the others. At that time the petitioner was twenty-eight years of age; the three others were much younger, the eldest being about eleven years of age.

It is urged in substance by the petitioner that when a person is a member of a class to whom a legacy is given without specifying the individual names, he is not excluded as one of the class simply by the fact that in a previous part of the will he was the recipient of an individual legacy, unless there is a manifest intent to ex-

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clude him. And such undoubtedly is the rule. See *Wainwright* v. *Tuckerman*, 120 Mass. 232, 238; *Bates, petitioner*, 159 Mass. 252, 257; *Westgate* v. *Farris*, 189 Mass. 587, 589; *Bartlett* v. *Houdlette*, 147 Mass. 25, 27; *Cushing* v. *Burrell*, 137 Mass. 21.

But this rule does not help the petitioner. We are of opinion that there is in this case a manifest intent that the petitioner, to whom an absolute legacy was given by the first part of the seventh clause, should not share in the provisions made in the latter part of that clause for the children of his son Charles. In addition to the circumstances hereinbefore recited, it is to be noted that the money set apart for the children was to be invested "the same as set forth in my will." That is to say, the money was not only to be invested but this income was to be paid to them until they came of age or, if females, were married. As stated above, this language was not applicable to those who might be of age. When the will was written it was not known whether the petitioner or any of the legatees, namely, the grandchildren living at the death of the testator, would be of age. But when the codicil was made the uncertainty as to whether the petitioner would take was removed. The language of the bequest was not applicable to him. As to his bequest as one of the children it was entirely inappropriate. It is evident that the testator, when he framed this bequest, could not have had in his mind the petitioner as one of the children of his son Charles under this clause. Otherwise he would not have used the language he did. The facts agreed all seem to indicate that for nearly twenty years the conclusion herein reached was that upon which the parties acted.

Decree of Probate Court affirmed.

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S. S. WHITE DENTAL MANUFACTURING COMPANY *vs.* COMMONWEALTH.

Suffolk. January 18, 19, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Tax, Excise. *Constitutional Law*, Interstate commerce, Due process of law, Equal protection of the laws. *Corporation*, Foreign.

The excise tax imposed by St. 1909, c. 490, Part III, § 56, upon certain foreign business corporations having usual places of business in this Commonwealth, to the amount of one-fiftieth of one per cent of their authorized capital stock not to exceed in any year $2,000, is in no way a tax on property but is in effect the requirement of a license fee for the privilege of doing a local business in this Commonwealth, and is not an unconstitutional interference with interstate commerce as applied to a corporation which at its place of business in this Commonwealth sells goods at wholesale and retail, one half of such sales being made to persons residing in Massachusetts and the other half for delivery to purchasers outside of Massachusetts.

St. 1909, c. 490, Part III, § 56, imposing an excise tax upon certain foreign business corporations having usual places of business in this Commonwealth, is not unconstitutional under the Fourteenth Amendment of the Constitution of the United States as taking property without due process of law or as denying to any person within the jurisdiction of the Commonwealth the equal protection of the laws.

PETITION, filed in the Supreme Judicial Court on November 4, 1911, under St. 1909, c. 490, Part III, § 70, by a corporation organized under the laws of the State of Pennsylvania to recover the amount of an excise tax assessed upon the petitioner by the Tax Commissioner of the Commonwealth under Part III, § 56 of the same statute and paid by the petitioner.

The case was submitted to *Braley*, J., upon an agreed statement of facts, containing the facts which are stated in the opinion. The petitioner asked the justice to make certain rulings of law to the effect that the statute, so far as concerned the petitioner, was unconstitutional upon the three grounds which are stated in the opinion. The justice refused the requests for rulings and ordered that the petition be dismissed, and at the request of the petitioner reported the case for determination by this court. If the rulings of the justice were correct, a decree was to be entered dismissing

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the petition; otherwise, a decree was to be entered for the petitioner in the sum of $200 with interest from the date of payment of such excise tax and costs.

C. A. Snow, (*W. P. Everts* with him,) for the petitioner.

A. Marshall, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. The petitioner is a foreign corporation organized under the laws of Pennsylvania, where are its principal offices. Its business is manufacturing artificial teeth and dental instruments and supplies and buying and selling such products. It does not manufacture in Massachusetts, but it has maintained for ten years in Boston a salesroom, offices, store and stock rooms, where it keeps a stock of goods sufficient for carrying on its business. At this place fifty-four persons are employed, twelve of whom are salesmen travelling in New England and the maritime provinces. It sells goods at wholesale and retail over its counters. About fifty per cent of its sales at the Boston place of business are to persons residing in Massachusetts. Sales of nearly an equal quantity are made there for delivery to purchasers outside of Massachusetts. Goods so sold are not transported by the petitioner, but by common carriers, the petitioner receiving a bill of lading, in which it is named as consignor and the purchaser as consignee. The bill of lading is mailed to the consignee, who, upon its surrender to the carrier, receives the goods. Other orders are received at the Boston office, which are filled by deliveries from factories of the petitioner in other States. Approximately ten per cent of the total sales of the petitioner are made in Massachusetts, one half of this percentage being to residents of Massachusetts, and one half to purchasers residing outside of Massachusetts. The petitioner's authorized and issued capital stock is $1,000,000. Its stock on hand, fixtures and bank deposits in Boston average $100,000. For the year 1911 the petitioner paid to the Commonwealth an excise under St. 1909, c. 490, Part III, § 56, which was measured by one-fiftieth of one per cent of the petitioner's authorized capital stock, and amounted to $200. This petition is brought to recover the excise so paid.

The several grounds of this claim by the petitioner relate to the constitutionality of the excise on foreign corporations for doing business in the Commonwealth provided by St. 1909, c. 490,

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Part III, § 56, and may be grouped as follows: 1. That it imposes an unlawful burden on interstate commerce. 2. That it takes property without due process of law. 3. That it violates the requirement for equal protection of the law.

The constitutionality of this statute was before this court first in *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239. There it was held as not intended to apply to foreign corporations having places of business in this Commonwealth devoted exclusively to interstate business, and, as so interpreted, "plainly constitutional." In *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, its constitutionality was discussed again. In behalf of the petitioner there it was urged that *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, required an overruling of *Attorney General* v. *Electric Storage Battery Co.*, but it was held in an exhaustive opinion of the court, speaking through Chief Justice Knowlton, that our statute was not governed by these decisions, and was constitutional notwithstanding them. We are asked to review and overrule these two decisions of our own, by reason of further recent decisions of the United States Supreme Court. The material part of the statute is that a foreign corporation is required to pay an annual excise of "one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

1. It is urged, first, that this is not really an excise, but a property tax upon all the property of the petitioner as represented by its capital stock, and hence a direct burden upon interstate commerce.

Before examining the federal cases relied upon by the petitioner, a reference to the nature of our system of exacting revenue from corporations will be helpful, for the purpose of determining whether the tax is what the Legislature called it, namely, an excise, or whether it is a property tax, as is now contended. Under our Constitution, which has been the organic law of this Commonwealth since 1780, taxes are of two kinds, property taxes and excises. The first of these must be both proportional and reasonable. The latter need not be proportional, but only reasonable. This distinction has been marked often in legislation, and defined

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somewhat in judicial decision. It was said in 1815 by Chief Justice Parker, in *Portland Bank* v. *Apthorp*, 12 Mass. 252, 255: "Those taxes [that is, those upon property] must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution. But there are other sources of emolument and profit, not strictly called property, but which are rather to be considered as the means of acquiring property, from which a reasonable revenue may be exacted by the Legislature. . . . The exercise of this power is called the imposing or levying of duties and excises."

The broad power of levying excises has arisen from the grant to the Legislature in the Constitution to impose them upon [among other subjects] any "commodities" within the Commonwealth. This word is of comprehensive signification, and includes the privilege of transacting business as a corporation, whether domestic or foreign, within the Commonwealth. *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, 495.

It has been said many times, through the years since the adoption of the Constitution, that any property tax in order to be valid under the Constitution must be proportional, and any such tax assessed upon certain property, at a rate different from that upon other property, is disproportionate. *Oliver* v. *Washington Mills*, 11 Allen, 268, 275. *Cheshire* v. *County Commissioners*, 118 Mass. 386, 389. *Northampton* v. *County Commissioners*, 145 Mass. 108, 109. *Opinion of the Justices*, 195 Mass. 607. *Opinion of the Justices*, 208 Mass. 616. The policy of the Commonwealth relative to the taxation of corporations, both domestic and foreign, has been founded upon this distinction between a property tax and an excise. It was established in 1862 as to savings banks, and in 1864 as to business corporations. The constitutionality of these acts was attacked. The excise upon the commodity of exercising the business of a savings bank was based upon the amount of its deposits, and upon that of being a business corporation on the

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market value of its capital stock after deducting its real estate and machinery, if any, taxed locally.

These excises were sustained as valid, on the ground that they were not property taxes. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312. *Commonwealth* v. *Hamilton Manuf. Co.* 12 Allen, 298. In the last two cases, the constitutionality of the statutes was assailed on the further ground that each corporation had a substantial part of its assets invested in bonds of the United States which were exempt from taxation under the Constitution of the United States. It was urged with great earnestness that an excise was unconstitutional which was based, in one case, upon the amount of deposits, a large part of which was invested in United States bonds, and in the other upon market value of shares deriving a material and ascertainable part of their value from the ownership of such bonds. On this ground each case was taken to the Supreme Court of the United States. *Provident Institution* v. *Massachusetts*, 6 Wall. 611. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. In the opinion in the latter case, it was said at pages 639, 640: "Separated from the peculiar provision of the State Constitution, and the long practice under the original decision [*Portland Bank* v. *Apthorp*, 12 Mass. 252] the present decision of the State court upon the subject might well be criticised as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause and in view of the long practice of the State, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence. . . . Property taxation and excise taxation, as authorized in the Constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the word 'commodities' as uniformly given by the courts of the State, and as universally understood by the taxpayers and assessors." *Society for Savings* v. *Coite*, 6 Wall. 594. The Legislature has applied the principle of an excise to telegraph and telephone companies, whether foreign or domestic, operating lines partly within and partly without the State, and these, though differing in the mode of ascertainment from the one now under consideration, have been upheld. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530. *Massa-*

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chusetts v. *Western Union Telegraph Co.* 141 U. S. 40. Similar statutes have been enacted respecting excises upon corporations operating railroads, street railways, electric railroads, and express companies. St. 1909, c. 490, Part III, §§ 40, 41, 43, 52, 72, 76. It has been applied to foreign insurance companies. *Oliver* v. *Liverpool & London Life & Fire Ins. Co.* 100 Mass. 531. *Connecticut Mutual Life Ins. Co.* v. *Commonwealth*, 133 Mass. 161.

The principle of imposing an excise upon the privilege of doing business within this State by a foreign mining, quarrying or oil corporation, based upon a percentage of the par value of its capital stock, was established by St. 1865, c. 283, § 8. This was held a valid excise under both the State and Federal Constitutions in *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148, where it was said, at page 153: "But it is not merely the franchise of incorporation that is the basis of the tax; nor is it the capital, regarded merely as property. . . . A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."

Thus it appears that for nearly one hundred years this court has sustained as constitutional excises upon corporations which could not have been upheld as property taxes under the terms of our Constitution. The conclusion is irresistible that the Legislature intended the financial burden now under discussion to be an excise. It is expressly declared by the terms of the statute to be an excise. The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect. *Hazen* v. *Essex Co.* 12 Cush. 475, 477. *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 145. It was said in *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. at 388, that "The required payment is strictly of an excise tax, and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here." *Pratt* v. *Street Commissioners*, 139 Mass. 559, 561, 562. *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526. *Suffolk Savings Bank for Seamen, petitioner*, 151 Mass. 103, 106. *Attorney General* v. *Massachusetts Pipe Line Gas*

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Co. 179 Mass. 15, 19. *Greenfield Savings Bank* v. *Commonwealth*, 211 Mass. 207.

It is apparent from this review that for many years the established policy of this Commonwealth has exacted revenue from all domestic corporations, chiefly by a system of excises, and not by property taxes. While, as has been pointed out, limited classes of foreign corporations had been taxed in the same way, those engaged in ordinary business and manufacturing had not been required until 1903 to pay any excise, and had been subject only to a limited property tax upon such real estate and goods, wares and merchandise as were within the State. Under this condition of the law, foreign corporations engaged in ordinary trade enjoyed distinct immunities over domestic corporations. *Boston Investment Co.* v. *Boston*, 158 Mass. 461. When the Legislature dealt with the subject of foreign corporations in the light of Massachusetts history and experience, it levied an excise, as it had for many years upon all domestic corporations. By St. 1903, c. 437, § 75, foreign corporations organized for purposes for which domestic corporations may be established under that statute were required to pay annually an excise as a condition for doing business within the Commonwealth. This statute subjected to its provisions all foreign corporations having a usual place of business in the Commonwealth or engaged without a usual place of business in the construction, alteration, erection or repair of a building, railroad, bridge or structure of any kind, save as other special provision was made. Speaking generally, such corporations included those engaged in ordinary mercantile or manufacturing business, but excluded transportation and public service corporations of all kinds, and banking, trust, surety and indemnity companies. It has been decided expressly so often as to be plain beyond the possibility of dispute, that there is a clear distinction between a property tax on the assets or capital of a corporation and an excise or license for the privilege of carrying on business. For example, it was said in *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 640, "Property taxation and excise taxation . . . are perfectly distinct."

This tax then must be regarded in the light of our taxation history and system as intended by the Legislature and interpreted by the courts as a pure excise tax. Upon no other ground could it be sustained under our own Constitution. In no sense can it be

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regarded under our jurisprudence as a property tax. It is said, however, that the law is unconstitutional as an interference with interstate commerce, under the decisions of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, *Pullman Co.* v. *Kansas*, 216 U. S. 56, *Ludwig* v. *Western Union Telegraph Co.* 216 U. S. 146, and *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. To these should be added *Atchison, Topeka & Santa Fe Railway* v. *O'Connor*, 223 U. S. 280, and *Oklahoma* v. *Wells, Fargo & Co.* 223 U. S. 298, decided since the argument. The principle established by these decisions is that the court, looking through the form of a statute to its substance, will ascertain whether in truth the impost is a direct tax upon interstate commerce, whatever may be the guise under which it is levied, and applying this rule, statutes under consideration in each of these cases requiring of all foreign corporations payment of a certain percentage of their entire capital stock were found to be a direct burden upon that portion of the corporate capital engaged in interstate commerce, and hence void. There are at least two important, and as we think vital, distinctions between these cases and the one at bar. The first is that these cases all relate to corporations directly engaged for hire in transportation of intelligence or commerce or persons between the States; and their capital invested in this business was of such a permanent and fixed nature that the local business could not be given up without impairing their capacity to transact efficiently their interstate business. Their main business was interstate commerce of a *quasi* public character. Our statutes now deal, and have always dealt with corporations of this character on a basis entirely different from that established respecting ordinary business corporations. See St. 1909, c. 490, Part III, §§ 40, 41, 43, 52, 72 and 76, and St. 1912, c. 457. Cases like these federal decisions could not arise under our scheme of taxation. The second distinction between our statute and those under consideration in the federal cases last cited, is that the maximum fee allowed by our statute is $2,000, which is the fee exacted of corporations having a capital of $10,000,000 or more. This provision demonstrates that it is not a property tax, but only an excise so limited that it cannot reach beyond a reasonable license fee. These differences appear on the face of our statute, when compared with those under review in the federal decisions. Its substance appears

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to be that which it is denominated, namely, an excise. But light is thrown upon its real effect by the interpretation placed upon it by this court. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, held that our statute did not relate to foreign corporations doing exclusively an interstate commerce, while *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390, decided that it did not apply "to a foreign corporation for the taxation of which there is no special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company."

It follows that our statute applies to corporations engaged in the transaction of ordinary business within the State. It comes precisely within the statement of law in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, made by the court speaking through Mr. Justice Harlan, at page 33: "It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce." This principle is supported by a great number of cases, many of which are cited in other parts of this opinion. It is established in its application to the case at bar especially by *Osborne* v. *Florida*, 164 U. S. 650, 655, *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181, *Cooper Manuf. Co.* v. *Ferguson*, 113 U. S. 727, *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 343. None of these cases are overruled or impaired by the opinion in *Western Union Telegraph Co.* v. *Kansas*, and some of them are affirmed by it.

The effect of our statute is to establish a maximum excise of $2,000 as a license for doing business in this State. It is a condition exacted annually as a prerequisite to conducting a local business here. It is the manner in which a fee is determined and

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levied for the gift of a function from the State, which it is at full liberty to deny or bestow. If the sovereignty confers the gift, it may fix its own conditions. This is in itself a reasonable sum. It does not exceed the amount which may be charged for an annual license to sell intoxicating liquors. A flat rate of $2,000 might have been charged all foreign business corporations without violation of any right guaranteed by the Constitution of the United States. The present statute graduates the fee down from that maximum. That in this regard it imposes a diminished burden upon the smaller corporation is not fatal. The gauge of this reduction is not the value of the property of the corporation, nor the actual value of its shares, but the par value of its capital stock. This fact, in conjunction with the comparatively small maximum established, is another indication that the excise cannot be a property tax. Reference to the par value of the capital stock in such connection "is made, not as descriptive of the subject to be assessed." *Provident Institution* v. *Massachusetts*, 6 Wall. 611, 627. The circumstance that the amount of the excise is not "unduly great, having reference to the real value" of property engaged in business (*United States Express Co.* v. *Minnesota*, 223 U. S. 335, 348) or that it "is not at all disproportioned to such local business and, therefore, not to be regarded as a mere device to reach or burden the interstate commerce of the company" (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 42) have been treated as significant factors in determining whether the statute was within the power of the State.

It seems plain from the agreed facts that there is in a legal sense no inextricable connection between the interstate and intrastate business of the petitioner. They are not so interwoven that they cannot be separated reasonably. The petitioner alleges that parts of its property, assets and place of business "in no way concern" its domestic business or "have no material reference" to it. The agreed facts as interpreted by the petitioner show a differentiation in amount. Indeed, this appears to be a necessary incident to ordinary business. Otherwise, every kind of business, when both interstate and domestic are conducted, merely by reason of commingling, might be regarded as inseparable. Unless this is so, any discussion of excise taxes on foreign corporations would be idle, for they could all be avoided by conducting an interstate and

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domestic business at the same place. Simply because the interstate and intrastate business may be conducted together more profitably or conveniently does not render them inextricably interwoven, nor the one necessarily incident to the other. Therefore, it is not necessary to define the principle which would govern under such circumstances.

The petitioner comes within the description contained in *Pullman Co.* v. *Adams*, 189 U. S. 420, 422. "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," and as was said in *Allen* v. *Pullman's Palace Car Co.* 191 U. S. 171, 182, it may "abandon the business if it saw fit," or in *Kehrer* v. *Stewart*, 197 U. S. 60, 67, "if the tax be imposed in terms upon the domestic commerce, . . . the corporation is free to abandon the business taxed if it sees fit." In *Galveston, Harrisburg & San Antonio Railway* v. *Texas*, 210 U. S. 217, at 227, it was said referring to the distinction between the right of the State to tax property [and by implication of its right to levy an excise or license] and in its incapacity to tax interstate business "The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. . . . A practical line can be drawn by taking the whole scheme of taxation into account." Our corporation tax system, in the light of its history, bears this test. It is a scheme of taxation which is founded wholly upon the proposition as its corner stone that it is not a property but an excise tax. This is its only support, and it falls utterly if this fails. As was said by Chief Justice Holmes, in *Tremont & Suffolk Mills* v. *Lowell*, 178 Mass. 469, at 471, "The franchise tax is not a tax on the property of the corporation, and its validity sometimes has depended upon this consideration." This system of taxation has grown up under the shelter of two express decisions in its support by the Supreme Court of the United States. *Provident Institution* v. *Massachusetts*, 6 Wall. 611, and *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. These have both been cited with approval in *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 164, 165, 167. It cannot be thought that there was any intent in the cases upon which the petitioner relies to overrule these cases or to destroy a system of taxation which so far as its federal aspects are concerned has been built upon faith in them. See the language of Holmes, C. J., in *Smith* v. *Mayor & Aldermen of Worcester*, 182 Mass. 232, 233. As a

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practical matter, there is no attempt to burden interstate commerce. It is only by an attempted extension of the principle of *Western Union Telegraph Co.* v. *Kansas* and the cases following it beyond its tensile strength that it even appears to reach the case at bar.

The result is that the petitioner may carry on its interstate business alone, if it chooses, without paying the excise, but if it prefers to exercise the commodity of doing a local business in our State, availing itself thus of our business and financial advantages and competing for domestic business under the protection of our laws, it must do so in accordance with those laws. Treating the statute as to substance and operation, it does not bear directly upon commerce among the States, nor amount to a regulation of it. Without repeating the reasoning of *Baltic Mining Co.* v. *Commonwealth*, we adhere to it, and find nothing at variance with its conclusions in the recent decisions of the United States Supreme Court.

We have not discussed the point much relied upon by the Commonwealth that a close analysis of the facts shows that a large percentage of the petitioner's business conducted in Boston is intrastate, and only a very small fraction interstate, for we reach our decision assuming that the proportions asserted by the petitioner in this regard are correct.

2. The grounds already discussed and the conclusions reached dispose of the contention that the statute takes property of the petitioner without due process of law. If the money payment required is an excise exacted solely for the privilege of conducting a domestic business within the State, a privilege which the petitioner is free to embrace or renounce, as we hold it to be, it follows that the petitioner, when voluntarily it took such steps as subjected it to an excise within the constitutional power of the State to exact, has not been deprived of its property except by the law of the land. See *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114.

3. It is urged that the excise law is invalid because contrary to the clause of the Fourteenth Amendment to the Federal Constitution inhibiting any State from denying "to any person within its jurisdiction the equal protection of the laws." Reliance in this respect is placed upon *Southern Railway* v. *Greene*, 216 U. S. 400, and *Louisville & Nashville Railroad* v. *Gaston*, 216 U. S. 418. These cases seem clearly distinguishable from the case at bar. They

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each relate to a railroad corporation which, as said in the opinion in *Southern Railway* v. *Greene*, at 414, came into the State with its "permission . . . and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the State. . . . It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. . . . The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed." The ground of the judgment in the cases relied upon is the feature of acquisition of property in its nature permanent, irremovable and inadaptable to other purposes, upon the faith of an existing law of the State. This principle does not affect or modify that other principle established by a long line of decisions that a State has an absolute and unqualified right to utterly prohibit or prescribe and change at will the terms upon which a foreign corporation, strictly commercial in its nature, may be permitted to do business within its borders. *Bank of Augusta* v. *Earle*, 13 Pet. 519. *Ashley* v. *Ryan*, 153 U. S. 436, 445. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28. *Snyder* v. *Bettman*, 190 U. S. 249. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 516. This point is quite disconnected with that of interstate commerce, and hence decisions on statutes touching insurance companies are pertinent. *Paul* v. *Virginia*, 8 Wall. 168. *Hooper* v. *California*, 155 U. S. 648, 652. *Philadelphia Fire Association* v. *New York*, 119 U. S. 110. *Home Ins. Co.* v. *New York*, 134 U. S. 594. *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 249, and other cases there cited. The law upon this subject, as stated by Mr. Justice Peckham, in the case last cited, at 257, is: "Thus it is admitted that a State has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives." There is nothing in this record to indicate a large and permanent investment by the petitioner in property adapted to its peculiar needs and not equally available at an equivalent or reasonable price for other valuable uses. The fact that it has leased a store has no tendency by itself alone in this direction. Moreover, there is

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nothing in the agreed facts or in the allegations of the petition to indicate that the operation of our system of tax laws as a whole is adverse to the foreign corporation as compared with others in like situation conducting business as individuals, partnerships or domestic corporations. An inspection of the law itself is far from showing any legislative hostility to foreign corporations as such, or the imposition of onerous burdens upon them, or that the excise law in its broader aspects and in its practical working is in any respect unjust or unequal.

It is a further significant circumstance that our statutes have never placed foreign and domestic corporations upon literally the same basis as to excises. An examination of the history of our statute law in this regard will show that for many years the foreign business corporation stood upon a ground distinctly more favorable than did domestic competitors. *Boston Investment Co.* v. *Boston*, 158 Mass. 461. *New York Biscuit Co.* v. *Cambridge*, 161 Mass. 326. *New England & Savannah Steamship Co.* v. *Commonwealth*, 195 Mass. 385, 388, 389. It surely cannot be the law that all efforts at equalization of the burdens of government are impossible and unlawful, for the reason that those who have heretofore enjoyed an undue advantage may be deprived of their preference. Looking at the two reports of special committees which were before the Legislature at the time of the enactment of St. 1903, c. 437, and St. 1909, c. 490, it is open to doubt whether our laws may not still discriminate in favor of the foreign business corporation against similar domestic corporations. The report of the Joint Special Committee on Taxation of 1907, which formed the basis of St. 1909, c. 490, in referring to the excise tax on foreign corporations provided by St. 1903, c. 437, § 75, said: "It seems clear . . . that the amount received from this excise tax is entirely inadequate to pay for the privileges enjoyed. . . . The fact that domestic corporations frequently find it to their financial advantage to give up their Massachusetts charters and become incorporated under the laws of some State other than Massachusetts inevitably leads to the conclusion that there is at present a discrimination in the matter of taxation against our own corporations and in favor of foreign enterprise." What this committee deemed a conservative recommendation is not, however, embodied in the existing law, but one in some respects more favorable to the foreign cor-

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poration. For these reasons there are ample distinctions between *Southern Railway* v. *Greene* and *Louisville & Nashville Railroad* v. *Gaston* and the case at bar. License or privilege fees are not taxation, and under the cases above cited may be limited to foreign corporations for the privilege of conducting intrastate business. As was said by Mr. Justice Shiras, in *New York* v. *Roberts*, 171 U. S. 658, at 661, 662: "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax." *Coulter* v. *Louisville & Nashville Railroad*, 196 U. S. 599. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. *St. Mary's Petroleum Co.* v. *West Virginia*, 203 U. S. 183, 191. *Pullman Co.* v. *Kansas*, 216 U. S. 56, 66, 67.

The single fact that a foreign corporation has become established within the State is not prohibitive against exercise of the power of the State as to the conditions under which the business may be continued where there is no permanent investment of property not adapted to general commercial uses like those of a railroad or telegraph company. This undoubted right of the State was treated as so clear as to need barely more than a statement in *National Council United American Mechanics* v. *State Council of Virginia*, 203 U. S. 151, 163. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322. See *Diamond Glue Co.* v. *United States Glue Co.* 187 U. S. 611.

Petition dismissed with costs.

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KEYSTONE WATCH CASE COMPANY *vs.* COMMONWEALTH.

Suffolk. January 19, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Tax, Excise. *Corporation*, Foreign.

A foreign corporation maintaining a factory in this Commonwealth for the manufacture of watch movements, which in this Commonwealth are combined with cases manufactured in other States and then are sold principally upon orders solicited and accepted outside the Commonwealth, not more than two per cent of the product being sold to purchasers in this Commonwealth, is engaged in this Commonwealth in the business of manufacturing, which is separable from the subsequent commerce involved in the sale of the product and is subject to the excise tax imposed by St. 1909, c. 490, Part III, § 56.

PETITION, filed in the Supreme Judicial Court under St. 1909, c. 490, Part III, § 70, to recover the amount of excise taxes assessed in the years 1910 and 1911 upon the petitioner, a foreign business corporation, under Part III, § 56 of the same statute and paid by the petitioner.

The case was heard by *Braley*, J., upon the petition and answer and an agreed statement of facts. He ordered that the petition be dismissed on the ground that Part III, § 56 of the statute authorized the assessment of the excise taxes upon the petitioner and that the section in its application to the petitioner was constitutional. At the request of the petitioner the justice reported the case for determination by the full court.

P. Ketchum, for the petitioner.

A. Marshall, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. The questions argued at large relate to the constitutionality of the provisions of St. 1909, c. 490, Part III, § 56, establishing an annual excise to be paid by foreign business corporations as a condition of doing business other than interstate commerce within the Commonwealth. It has been held in *S. S. White Dental Manuf. Co.* v. *Commonwealth*, *ante*, 35, *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, and *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, after extended ex-

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amination of authorities, that the statute as construed by these decisions does not contravene any clause of the Constitution of the United States or of this Commonwealth. It is not necessary to restate the principles or the reasoning of such recent decisions. They are adopted as the basis of this judgment.

In brief, the statute has been held not to apply to foreign corporations carrying on general interstate commerce exclusively, or engaged in conducting some kind of interstate commerce for hire as its principal function with which intrastate business is so closely connected that it cannot be given up without serious detriment to the interstate commerce, like telephone or telegraph business, or to the interstate portion of the business conducted by a corporation doing both interstate and intrastate commerce, and not to impose a property tax or any burden upon the transaction of interstate commerce. But it does impose an excise as a condition precedent to the doing of business other than interstate commerce within the Commonwealth by foreign corporations, whether such business is exclusively domestic or conducted in connection with interstate commerce. The statute exacts only a license fee upon foreign corporations for the privilege of doing domestic business within the Commonwealth.

It remains to examine the special facts of this case in order to determine whether it comes within the terms of the statute thus interpreted, or whether there are such vital differences between this and the cases just cited as to call for the application of other rules of law. The petitioner is a Pennsylvania corporation engaged in the business of manufacturing and selling watches, watch cases, watch movements and other similar articles. Its principal place of business is in Philadelphia, where are located its executive offices. It maintains sales offices in New York, Ohio, Illinois and California. It owns and operates extensive manufacturing plants in Pennsylvania, and at three different places in New Jersey. At Waltham in this Commonwealth it also maintains a large factory with fixtures, machinery and other appliances fully equipped for the manufacture of watches, where it employs about three hundred and seventy-five persons in the manufacture of watch movements. At the factory in this Commonwealth are manufactured watch movements, which here are combined with cases manufactured at its New Jersey and Pennsylvania plants.

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Not more than two per cent of the product is sold to purchasers in this Commonwealth. Ninety-five per cent is sold upon orders solicited and accepted outside the Commonwealth. The authorized capital stock of the petitioner is $8,500,000 of which $6,000,000 are now outstanding. The value of its physical assets at the Waltham plant is $1,300,000, and the total value of its physical assets at its five plants is $7,242,000. It is obvious, from this description, that the activities of the petitioner conducted within this Commonwealth are chiefly those of manufacture, and not of commerce. The distinction between manufacture and commerce is sharp and well defined. Manufacture is the dominant business of the petitioner in this Commonwealth. Incidentally, some kind of commerce to some extent may be necessary to the conduct of most manufacturing business, but it is subsidiary rather than primary. *Kidd* v. *Pearson*, 128 U. S. 1, 20. *United States* v. *E. C. Knight Co.* 156 U. S. 1, 14. The maintenance of the petitioner's plant in Massachusetts is for a distinct department of its manufacture. Although manufacture contemplates commerce, that is a subsequent stage. Its manufacturing business is entirely separable from the commerce which follows and which is involved in the sale of the product. The petitioner, by reason of its several factories located in different States, does not thereby conduct a business so unified and interwoven as to be in a position similar to a telegraph or telephone company. Its factory here is separable in valuation as appears by the statement of facts. It is not a necessity for its interstate commerce nor necessarily maintained for use in connection with interstate commerce. In its essential facts, the case at bar is indistinguishable from *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239. On the authority of that case and *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, and *S. S. White Dental Manuf. Co.* v. *Commonwealth*, *ante*, 35, and for the reasons there set forth, and under the interpretation of the statute there established, the petitioner was liable to the excise, and is not entitled to recover.

Petition dismissed with costs.

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HENRY WOOD *vs.* FRED F. BLANCHARD.

Suffolk. March 6, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Performance and breach. *Evidence*, Presumptions and burden of proof. *Waiver*.

In an action for the breach of a contract by which the defendant agreed to give to the plaintiff his personal note secured by a mortgage on certain real estate to secure a loan from the plaintiff to the defendant, where the defendant set up and relied upon an alleged waiver of the defendant's agreement to give his personal note, there was evidence that the defendant left with one who subsequently acted as attorney for the plaintiff a note of a third person secured by a mortgage on the real estate in question made by such third person, that this mortgage subsequently was foreclosed by the plaintiff and that the amount received from the foreclosure sale was credited upon the plaintiff's claim against the defendant, but there also was evidence that the attorney when the mortgage made by the third person was left with him declined to receive it as a compliance with the defendant's agreement. *Held*, that the question whether the mortgage made by the third person was accepted by the plaintiff in substitution for the mortgage and note of the defendant and thus constituted a waiver was for the jury, and that the burden of proving this as an affirmative defense was upon the defendant.

CONTRACT, originally with six counts. Writ in the Municipal Court of the City of Boston dated November 2, 1901.

On appeal to the Superior Court the case was tried before *Pierce*, J. All of the counts of the declaration except the fourth and sixth were waived by agreement before the trial. The evidence is described in substance in the opinion. At the close of the evidence the defendant asked for certain rulings of which the first four were to the effect that the plaintiff was not entitled to recover on the fourth and sixth counts. At the suggestion of the presiding judge the pleadings then were amended as stated in the opinion. The amended declaration was on a contract in writing as there quoted, and alleged that the plaintiff lent the defendant $1,000 as provided in the agreement but that the defendant refused and neglected to give him a second mortgage upon the real estate in Malden described in the agreement, and neglected to improve and develop that property from which he had agreed that the plaintiff should receive twenty-five per cent of the net profits.

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The answer contained an allegation that the plaintiff waived any right to a note and mortgage signed by the defendant by receiving, accepting, recording and foreclosing a mortgage on the premises in Malden signed by Austin R. Smith together with the receipt of the note signed by Smith.

The judge then refused to make the following rulings requested by the defendant:

"6. Upon all the evidence as a matter of law, the plaintiff waived his claim to receive the defendant's personal note by recording and foreclosing the mortgage given to him by Austin R. Smith to secure Smith's note to the plaintiff, and in so doing the plaintiff made an election to receive that note and mortgage instead of the defendant's." [The mortgage of Smith was upon the real estate in Malden mentioned in the agreement, which had been conveyed to Smith by the defendant.]

"8. As a matter of law, the plaintiff cannot recover in this action upon the written contract in evidence, but must bring an action for an accounting between himself and the defendant."

The judge submitted the case to the jury, giving, upon the question of waiver, the instructions described in the opinion. The jury returned a verdict for the plaintiff in the sum of $881.87; and the defendant alleged exceptions.

W. R. Bigelow, for the defendant.

R. G. Dodge, for the plaintiff.

RUGG, C. J. The fair interpretation of that which occurred at the close of the evidence when the defendant's requests for rulings were presented is that the suggestion of the court, to the effect that in order to present the issues fairly both parties needed to amend their pleadings, was adopted by both parties. The result was that an amendment to the declaration and an amendment to the answer were filed. The case was submitted to the jury on the amended pleadings. The other counts dropped out of the case. This is equivalent to the contention of the defendant that his first four prayers were granted. At all events, it is plain that the judge of the Superior Court did not treat anything as open except the amended pleadings, and the parties acceded to this without objection.

The case of the plaintiff then rested upon an alleged breach by the defendant of a written agreement, signed by both parties, of

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the following tenor: "Agreement made this eighteenth day of December, 1900, between Fred F. Blanchard of Malden, Mass., and Henry Wood of Natick, Mass., whereby it is mutually agreed and understood that the said Wood is to receive 25 per cent of all net profits accruing from estates Nos. 51, 53, 55 and 61 Glen Ave. Malden, Mass. (which is to be derived from the improvement and development of said property), in consideration for the loan of $1,000 secured by second mortgage on said premises." A large amount of evidence was introduced without objection or exception showing the circumstances of the parties at the time when this agreement was made. It is not necessary to decide whether all of this evidence as to the terms of the agreement between the parties was competent as relating to separate or collateral matters as to which the document was silent (*Durkin* v. *Cobleigh*, 156 Mass. 108), or as tending to explain ambiguous parts of the contract (*Jennings* v. *Puffer*, 203 Mass. 534), for being admitted without objection it was entitled to its probative force, and properly was considered by the jury. *Hubbard* v. *Allyn*, 200 Mass. 166. The case upon this aspect is distinguishable from *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122, 132, 133, and other like decisions.

There was evidence from which the jury might have found that the agreement between the parties, in addition to that stipulated in writing, was that the defendant should give to the plaintiff his personal note secured by a mortgage upon the real estate in question, and that he should use the money advanced to him by the plaintiff in the improvement of the real estate, and that there was a breach of this agreement by the defendant. It follows that the request of the defendant to the effect that the plaintiff could not recover upon the written contract, but must bring an action for an accounting between himself and the defendant, was refused rightly. The agreement, if found to be that the defendant should give his personal note to the plaintiff, was not fulfilled by the tender of a mortgage and note of a third person. There was evidence from which it might have been found that the defendant did substantially nothing in compliance with the terms of the contract, and it plainly could have been found that if any joint enterprise was contemplated by the agreement, the defendant never performed his part in any material respect.

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The defendant requested a ruling that the plaintiff waived his claim to receive the defendant's personal note by recording and foreclosing the mortgage given by one Smith to secure the latter's note to the plaintiff, and that thereby the plaintiff elected to receive the Smith note and mortgage instead of the defendant's. This request was predicated upon evidence from which it might have been found that at a considerable time after the making of the agreement the defendant left with one Baker, who subsequently acted as attorney for the plaintiff, a mortgage and note by one Smith to the plaintiff, and that this mortgage was subsequently foreclosed by the plaintiff, and the amount received from the foreclosure sale was credited upon his claim against the defendant. There was testimony from Mr. Baker that at the time the Smith mortgage was left with him he declined to receive it from the defendant as a compliance with the agreement. The Superior Court left it to the jury to find whether the Smith mortgage was accepted in place of a mortgage and note by the defendant, and gave ample instructions as to what would constitute a waiver, and expressly instructed them that if the parties understood that the Smith mortgage was received in substitution for the mortgage of the defendant, that would constitute a waiver. The waiver of the terms of the agreement was set up as a defense. This being an affirmative defense, the burden was upon the defendant to establish it. *Boyden* v. *Hill*, 198 Mass. 477, 486. Whether this burden had been sustained or not depended upon oral testimony and the circumstances under which the parties acted and all the reasonable inferences. This was a fact to be determined by the jury. It is rarely if ever that it can be ruled as matter of law that the burden of proof in a case like this has been sustained. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 209 Mass. 105, 110.

Exceptions overruled.

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MAX GOLDSTEIN *vs.* FRANK A. CONNER.

Middlesex. March 6, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Municipal Corporations, By-laws and ordinances.

A city, which has accepted the provisions of R. L. c. 104, § 1, and by that section is authorized for the prevention of fire and the preservation of life to regulate by ordinance "the inspection, materials, construction, alteration and use of buildings and other structures within its limits," has no power to prohibit by ordinance the erection of any building for mercantile purposes without a license from the board of aldermen.

A provision in a building ordinance of a city that has accepted the provisions of R. L. c. 104, § 1, which is void because it exceeds the power of the city in prohibiting the erection of any building for mercantile purposes without a license from the board of aldermen but which is separable from other parts of the ordinance dealing generally with the subject of building regulation and inspection, does not render invalid a provision in the ordinance for the issuing by the building inspector of permits for the erection of buildings in accordance with plans and specifications which comply with the requirements of the ordinances of the city.

RUGG, C. J. This is a petition for a writ of mandamus* brought by a land owner in Malden to compel the building inspector of that city to issue to him a permit for the erection of a building. The city of Malden has accepted the provisions of c. 104 of the Revised Laws, whereby it might under § 1 "for the prevention of fire and the preservation of life, by ordinances . . . not inconsistent with law and applicable throughout the whole or any defined part of its territory, regulate the inspection, materials, construction, alteration and use of buildings and other structures within its limits." In reliance upon the authority assumed to have been conferred by this statute, the city of Malden passed two sections of an ordinance, which are printed in a footnote.†

* Reported by *Braley*, J., for determination by the full court.

† Sec. 7. "All persons intending to erect a chimney of any kind or any building within the city shall first, before proceeding to erect the same, or to lay the foundations thereof, obtain a permit in writing from the inspector, except as provided in section 8."

Sec. 8. "No person shall erect or use any building for a planing mill, wood

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The petitioner caused to be prepared a set of plans and specifications which complied with the ordinances of the city and which were filed with the respondent. The board of aldermen of the city gave a hearing to the petitioner on his application for a license to build upon his land a one story brick building to be occupied for mercantile purposes, and denied his application. It is not contended that the building, if built in accordance with the plans and specifications, would violate any regulation of the city as to material, location, size or construction. The respondent has refused to issue a permit to build on the ground that he is not authorized to do so until the board of aldermen have granted a license.

The case is in brief that the city of Malden has enacted an ordinance to the effect that no one can erect a building for mercantile uses without a license from the board of aldermen, and the board of aldermen refuse to grant such license when the proposed building complies in every respect with all building laws. Such an ordinance is beyond the scope of R. L. c. 104, § 1. The construction of buildings for mercantile purposes is a lawful use of property. It has no inherent tendency to impair the health or comfort of the people, or to increase unduly the risk of fire. It does not interfere with public peace, morality or safety. It is not a use of property which in the present state of society and of civilization can be absolutely prohibited in the cities and towns of the Commonwealth. Cases like *Newton* v. *Joyce*, 166 Mass. 83, *Commonwealth* v. *Parks*, 155 Mass. 531, *Quincy* v. *Kennard*, 151 Mass. 563, *Commonwealth* v. *Ellis*, 158 Mass. 555, *Belmont* v. *New England Brick Co.* 190 Mass. 442, and *Worcester Board of Health* v. *Tupper*, 210 Mass. 378, plainly are distinguishable.

The Legislature has ample power to regulate and to authorize cities and towns to regulate by general rules the materials, height, plans, manner of construction, exits, and other essentials of build-

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working or carpentering establishment, or any building to be used in whole or in part for mercantile, or manufacturing purposes, or any stable for four or more horses, or for a public automobile garage, or for a hotel or public hall, without obtaining a license in writing from the board of aldermen, and thereafter obtaining a permit in writing in accordance with said license from the inspector and shall deposit plans and specifications thereof in the office of the inspector at the time of the application for the permit."

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ings and the uses to which they may be put for the prevention of fires and guarding the safety of those who frequent them. R. L. c. 104, § 1, is a constitutional exercise of the police power. *Salem* v. *Maynes*, 123 Mass. 372. *Commonwealth* v. *Hayden*, 211 Mass. 296.

But this ordinance is not of that class. It has no legitimate tendency toward prevention of fires nor the preservation of life. It is an absolute prohibition of the construction of a mercantile building, except in pursuance of a license from the board of aldermen. It does not regulate the issuance of the license in accordance with any general principles. It furnishes no guide to which the municipal board may look for instruction, or to which the land owner may appeal for a determination of the correctness of his conduct. It purports to confer unrestrained power upon the municipal authorities to give or withhold the license by an arbitrary exercise of will and without reference to the property rights of the applicant or the excellence of the proposed building. It does not relate to inspection of buildings in process of construction, nor does it standardize designs or materials, nor establish any of the important details which affect the strength, inflammability, light, air or exits of the building. A use of property lawful in itself and having no essential tendency toward harm to the public, while it may be subject to reasonable regulation, cannot be made utterly dependent upon the unrestrained arbitrament of the board of aldermen. *Commonwealth* v. *Maletsky*, 203 Mass. 241, 248. *Durgin* v. *Minot*, 203 Mass. 26. *Newton* v. *Belger*, 143 Mass. 598. *Winthrop* v. *New England Chocolate Co.* 180 Mass. 464.

The question remains whether the respondent is required to issue the permit under these circumstances, when a part of the ordinance is invalid. Section 7 of the ordinance requires him to issue a permit for all buildings "except as provided in section 8." Section 8 requires the deposit of plans and specifications of all buildings comprehended within its terms with the inspector and the issuance of a permit by him in accordance with the license granted by the board of aldermen. These sections of the ordinance are the only ones before us, but it may be inferred from other facts in the record that they are parts of an ordinance dealing generally with the subject of building regulation and inspection. Applying to such an ordinance the principle resorted to in the interpretation of statutes that if the invalid portion is separable

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from the other parts, so that they may stand independently of it, and valid and invalid are not so interwoven that it cannot be assumed that one would have been enacted without the other, we are of opinion that the ordinance may be regarded as subsisting and enforcible, save in the single respect pointed out. It is unlikely that a building ordinance would be enacted which did not contain provision for the ascertainment whether plans and specifications conform to its requirements, and for the determination whether the structure as built was in accordance with the plans and specifications. *Writ of mandamus to issue.*

D. Stoneman, (*A. I. Stoneman & A. G. Gould* with him,) for the petitioner.

H. L. Boutwell, (*F. P. Miller* with him,) for the respondent.

ALFRED S. BENSON *vs.* WILLIAM A. TUCKER & others.

Suffolk. March 6, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Infant. Contract, Validity, Rescission. *Agency. Stockbroker.*

After a minor at different times has paid to a stockbroker sums of money to be used in a series of transactions in which under specific orders of the minor the stockbroker buys designated shares of corporate stock, receives certificates thereof on the minor's behalf, sells those shares and buys others, which subsequently he sells, and pays to the minor as the net result of the transactions a sum of money less than the amount paid to him by the minor, the minor may rescind all the transactions and may recover from the stockbroker the difference between the amount he had paid to the stockbroker and the amount he had received from him.

CONTRACT for money paid to the defendants, a firm of stockbrokers, by the plaintiff while under age, to be used in the purchase and sale of shares of stock designated by the plaintiff. Writ in the Municipal Court of the City of Boston dated October 22, 1910.

On appeal to the Superior Court the case was heard by *Crosby*, J., without a jury, upon an agreed statement of facts, from which the following facts appeared.

The plaintiff was born on October 27, 1889. On August 16,

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1909, he gave to the defendants an order to purchase for him ten shares of a certain corporate stock and paid to them for that purpose $868.75, and the defendants on the same day purchased the shares for the plaintiff from certain other brokers in the open market for the designated sum, and upon receipt of the stock certificates placed them in a private envelope marked with the plaintiff's name, separate and apart from their own securities, and held them at his disposal. Subsequently the shares were sold by the defendants for the plaintiff upon his order at a slight profit, and, with the proceeds thereof and some further cash provided by the plaintiff, the defendants purchased for him in the same manner twenty shares of another corporate stock. There were several further transactions of purchase and sale, all conducted in the same manner and during the plaintiff's minority. The plaintiff from time to time drew from his account with the defendants various sums in cash, aggregating $397.40, the account finally being closed on October 20, 1910, upon which date he received from the defendants a check for $171.25. The net result of the transactions was a loss to the plaintiff of $471.35.

On October 22, 1910, Sophia Benson, the plaintiff's mother, was appointed his temporary guardian and on the same day she demanded from the defendants in the name of the plaintiff the return of $471.35.

The defendants asked for the following rulings:

"1. Relations between the defendants and Alfred S. Benson were those of principal and agent.

"2. The facts disclosed an executed agency which cannot be avoided.

"3. The facts disclosed payment by an infant's direction which cannot be avoided after the infant becomes of age."

The judge refused the rulings and found for the plaintiff in the full amount claimed with interest. The defendants alleged exceptions.

L. A. Ford, for the defendants.

A. L. Woodman, for the plaintiff.

BRALEY, J. The appointment of the defendants as his agent by the plaintiff, who is a minor, to buy and sell for him certain shares of copper stocks was under our decisions not void but voidable only at his option, and the notice of disaffirmance given in the plaintiff's

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behalf by his guardian, even if delayed until all the transactions between the parties had been adjusted was a sufficient rescission. *Whitney* v. *Dutch*, 14 Mass. 457, 461. *Simpson* v. *Prudential Ins. Co.* 184 Mass. 348. The defense is, that the plaintiff's money which he advanced with the first order having been invested as he directed, and his subsequent orders having been duly executed he cannot rescind. If in *Breed* v. *Judd*, 1 Gray, 455, and *Welch* v. *Welch*, 103 Mass. 562, it was held, that an executed contract beneficial to the minor could not be rescinded unless he restored the consideration, the plaintiff did not receive any of the shares of stock which the defendants purchased for him, and no inference can be drawn, that after his incapacity had been removed he intended to ratify the acts of his agents. *Gibson* v. *Soper*, 6 Gray, 279, 283. *Todd* v. *Clapp*, 118 Mass. 495. The money received from the defendants as the net result of all the purchases and sales, never equalled the amount of the first advancement. A substantial loss resulted, and neither as matter of fact nor as matter of law has the plaintiff been benefited. *White* v. *New Bedford Cotton Waste Co.* 178 Mass. 20, 24. The law because of his minority confers upon him the unqualified right to disaffirm the agreement, and the judgment of the Superior Court should be affirmed. *Dubé* v. *Beaudry*, 150 Mass. 448. *Gillis* v. *Goodwin*, 180 Mass. 140.

So ordered.

FRED F. BRYANT *vs.* BOSTON ELEVATED RAILWAY COMPANY & another.

Suffolk. March 7, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, Street railway.

At the trial of an action for personal injuries against a street railway company and an express company there was evidence that, just before the plaintiff was injured, a vestibuled street car of the street railway company and a team of the express company had been proceeding along a street side by side in broad daylight and approaching an intersecting street where travel was so greatly congested that a police officer had been stationed there for the protection of travellers;

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that the street car tracks turned sharply to the left on the intersecting street; that, at a signal from the policeman, the car and the team proceeded forward, the car moving a little faster than the team; that the driver of the team intended to continue across the intersecting street and, in order to do so, had to turn somewhat to the left to pass around a building which projected into the street from his right about opposite the curve in the tracks; that as the car rounded the curve the rear vestibule swung out, caught the front hub of the wagon and pushed the wagon and the horse so that the horse struck the plaintiff who was on a sidewalk and injured him. *Held*, that there was evidence upon which the jury might have found that the plaintiff's injuries were caused by concurrent negligence of both defendants.

TORT against the Boston Elevated Railway Company and the New York and Boston Despatch Express Company for personal injuries sustained on April 1, 1905, when, as the plaintiff was on the sidewalk on State Street in Boston and just emerging from the archway for pedestrians at one end of the Old State House, he was struck by a horse which was hitched to a wagon of the defendant express company, the wagon and horse having been pushed by a car of the defendant street railway company. Writ dated April 10, 1905.

In the Superior Court the case was tried before *Brown*, J.

On the following page is a reduction of the main features of a plan which was introduced in evidence.

There was evidence tending to show that a car of the defendant street railway company was proceeding on the right hand track on Devonshire Street toward State Street; that nearly abreast of it and proceeding with about equal speed was the team of the defendant express company; that a police officer was standing between the street car tracks at the point where Devonshire Street enters State Street; that on the policeman's signal the car and the team passed him slowly, the car a little in the lead; that it was the intention of the driver of the team to turn enough to the left to continue past the end of the Old State House down Devonshire Street; that, as the car rounded the curve into State Street, the rear vestibule caught the front left hand hub of the express wagon and pushed the wagon forward, and that, although the driver of the team pulled back hard on the reins, the horse was pushed against the plaintiff, who was just coming out of the archway at the point marked with a cross on the plan, and the plaintiff was knocked down and rendered unconscious.

At the close of the plaintiff's evidence, the defendant Boston

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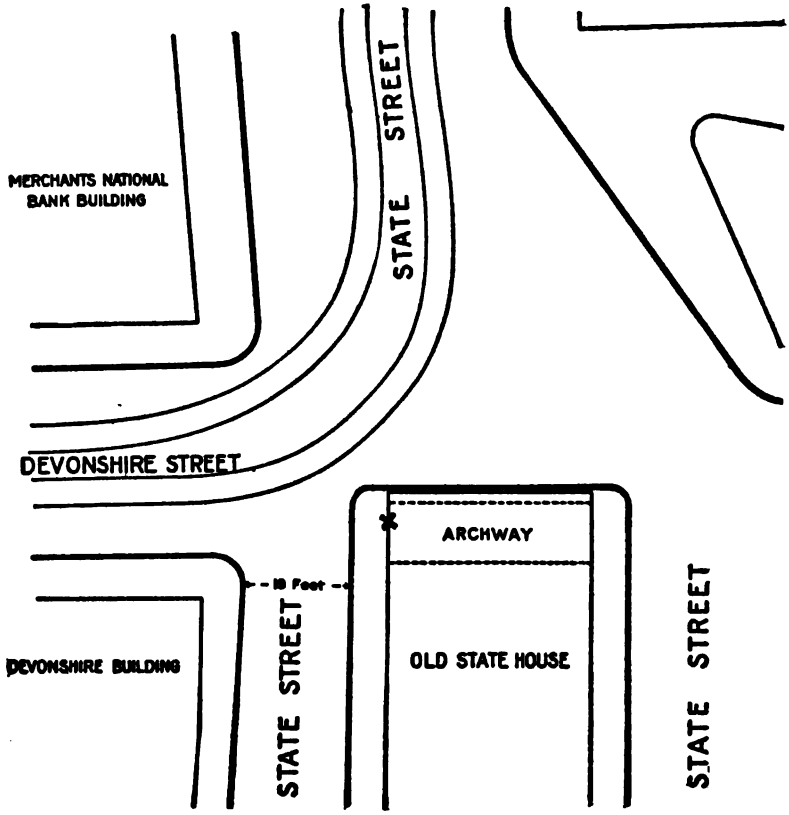
Elevated Railway Company rested its case, and at the close of all the evidence the judge ordered a verdict in its favor; and the plaintiff excepted.

At the close of all the evidence the defendant express company asked the judge to rule that the plaintiff could not recover against it. The ruling was refused and the express company excepted.



There was a verdict for the plaintiff against the express company for $2,000, and the judge reported the case for determination by this court under an agreement which provided that, "if upon the evidence introduced by the plaintiff there was sufficient evidence of negligence on the part of the Boston Elevated Railway Company to warrant a verdict against that defendant, and the rulings in respect to the defendant express company were correct, then judgment was to be entered for the plaintiff against

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the Boston Elevated Railway Company jointly with the other defendant for the amount of the verdict."

W. C. Cogswell, for the plaintiff.

M. J. Sughrue, for the Boston Elevated Railway Company.

H. F. Hurlburt, Jr., (*C. A. Wilson* with him,) for the New York and Boston Despatch Express Company.

BRALEY, J. The plaintiff while upon a public way as a pedestrian without any reasonable cause to apprehend that his position might be unsafe was struck, knocked down, and rendered unconscious by a wagon driven by a servant of the defendant express company. If the combination of circumstances which produced the injury may be infrequent, they are not extraordinary, and, the issue of this defendant's negligence having been a question for the jury, the refusal to order a verdict in its favor was right. *Powell* v. *Deveney*, 3 Cush. 300. *Slattery* v. *Lawrence Ice Co.* 190 Mass. 79. *Hanley* v. *Boston Elevated Railway*, 201 Mass. 55, 59. *Dulligan* v. *Barber Asphalt Paving Co.* 201 Mass. 227, 231.

But the ruling that the plaintiff could not recover against the defendant railway company should not have been given. The parties were concurrently using the public ways, and each defendant could not disregard the rights of other travellers, or escape the consequences if every reasonable precaution was not taken to avoid injury to them. *O'Brien* v. *Blue Hill Street Railway*, 186 Mass. 446, 447. The jury would have been warranted in finding, that for some distance below the place of the accident the car and wagon, while moving in the same direction, proceeded with equal speed, when as they approached a sharp curve in the railway track where it turned into a cross street the car passed the wagon, which then moved up until as they entered the curve the car and wagon were abreast, or the wagon might have been slightly in advance. As it approached the curve the car slackened speed, while the wagon moved slowly, and the width of the street with the sharp curvature of the track plainly showed that the wagon and the car could not simultaneously pass substantially abreast around the curve and the car turn to the left without coming in contact. It also appeared, that at this corner travel during the day time became greatly congested, and because of the volume of traffic a police officer had been stationed for the protection of travellers. It was with this situation before them, that in broad

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daylight the motorman and the driver after a signal from the officer that they could proceed, moved forward, and the car going at greater speed outstripped the wagon. The projecting rear end of the car in passing swung over the roadway, and coming into collision with the wagon forced it over the sidewalk, where it felled the plaintiff. It was the duty of the motorman to have stopped the car if he saw that the driver had determined to go on, and it was the duty of the driver not to have attempted to pass the car and turn to the left until the car had passed him, and if either the motorman or the driver had acted with ordinary prudence the collision would have been averted, and the injury to the plaintiff would not have happened. *Carrahar* v. *Boston & Northern Street Railway*, 198 Mass. 549. *Wright* v. *Boston & Northern Street Railway*, 203 Mass. 569, 570, 571. The plaintiff having offered abundant evidence that his injuries could be attributed to the concurrent misconduct of the defendants, he can recover judgment against both, although he can have but one satisfaction in damages. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575, 581. By the terms of the report judgment is to be entered on the verdict for the plaintiff against both defendants.

So ordered.

FOURTH NATIONAL BANK OF BOSTON & others *vs.* COMMONWEALTH.

Suffolk. March 7, 8, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Damages, For land taken or damaged under statutory authority. *Evidence*, Remoteness, Of value.

At the trial of a petition for the assessment of damages for a taking by the Commonwealth of a tract of land by right of eminent domain, it appeared that the land in question comprised a tract of nearly thirty acres fronting on a public way and that the petitioner had divided it into building lots, some of them fronting on the public way and some on private ways running into the interior of the tract. The lots fronting on the public way were more valuable than those in the interior of the tract. None of the lots had been sold. On the other side of the public way, directly opposite the petitioner's land, was another tract

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which had been divided by its owner into lots substantially like those of the petitioner, and there had been sales of lots in that tract fronting on the public way, some for cash and some where only a part of the purchase price was paid in money, the payment of the balance being secured by a mortgage from the purchaser. Evidence of such sales was admitted. *Held*, that the determination of the question whether the evidence should have been admitted was within the discretion of the trial judge, and that he had not exercised his discretion improperly.

At the trial of a petition for the assessment of damages for land taken by the Commonwealth by right of eminent domain, it appeared that the petitioner's land comprised a tract of thirty acres, and the Commonwealth in cross-examination of a witness for the petitioner introduced without objection evidence of a sale at public auction of a tract of eleven acres adjoining the petitioner's land, of similarity of the tracts, and that for thirty years both tracts had been unoccupied except for agricultural purposes. With the consent of counsel and accompanied by them the judge viewed the premises and thereafter on his own motion excluded the evidence of the price paid for the eleven acre tract on the ground that that tract was not sufficiently similar to the petitioner's land to make it a fair standard of value. There was no statement by the judge of the topographical differences upon which the ruling was based. The Commonwealth excepted. *Held*, that it could not be said as a matter of law that the judge had exercised his discretion improperly.

BRALEY, J. The petitioner's land having been taken in fee for the use of the public under the St. of 1909, c. 535, and a jury having been asked for and damages assessed as provided by the statute, the case is before us on the respondent's exceptions, which were confined at the argument to alleged errors in the admission and exclusion of evidence.*

The land, comprising a tract of nearly thirty acres divided into building lots, fronted on the northerly side of a public way, and the tier of lots abutting on the way, being more attractive to purchasers, would command a higher price in the market than the portions not so advantageously located.† If the measure of damages was the fair market value of the whole parcel, yet the petitioner would not have been precluded from introducing evidence of the price received from actual sales of these lots. But,

* The Fourth National Bank of Boston (called the petitioner) filed the petition on March 26, 1910, and alleged that it was the owner in fee simple of the land in question. Thereafter various mortgagees and claimants of interests in the land were allowed to intervene. The case was tried before *Stevens*, J.

† In the petitioner's plan, private streets were shown running into the interior of the tract, with building lots on both sides of them.

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as no sales had been made, evidence of this character was not available, and it was permitted to offer evidence of sales of lots for cash, or where the purchase price was payable partly in money, and the balance secured by a mortgage back from the purchaser, which abutted on the south side of the way directly opposite the land in question. It long has been settled, that in the assessment of damages where lands are acquired by eminent domain evidence is admissible of the price received from sales of land similar in character, and situated in the vicinity, if the transactions are not so remote in point of time that a fair comparison practically is impossible. *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316, 326. *Paine* v. *Boston*, 4 Allen, 168. *Benham* v. *Dunbar*, 103 Mass. 365. It rests very largely within the province of the presiding judge to determine in his discretion if the evidence shall be accepted or rejected. *Paine* v. *Boston*, 4 Allen, 168. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115, 117. *Ham* v. *Salem*, 100 Mass. 350, 352. The conditions which often may make the decision difficult vary with the circumstances of each case, and are amply pointed out by Morton, J., in *Lyman* v. *Boston*, 164 Mass. 99, 104, 105. The decision of the trial judge, if manifest error is affirmatively shown by the excepting party, is however reviewable. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1, 8. *Chandler* v. *Jamaica Pond Aqueduct*, 122 Mass. 305, 307. *Muskeget Island Club* v. *Nantucket*, 185 Mass. 303. But the respondent fails to point out elements of dissimilarity sufficient to render the evidence irrelevant and prejudicial. The lots sold were in the same street and vicinity, and appear to have been substantially alike, and if by the terms of sale a part of the purchase price in some instances remained on mortgage, this condition did not restrict competition among bidders, or prevent the sales from being a fair standard of comparison. *Amory* v. *Melrose*, 162 Mass. 556, 558.

The respondent in the cross-examination of a witness called by the petitioner introduced without objection the sale at public auction of a tract of eleven acres adjoining the petitioner's land and the price received and also elicited testimony of the similarity of the tracts, and that during a period of thirty years both parcels had been unoccupied except for agricultural purposes. But with the consent of counsel, and accompanied by them, the judge took

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a view of the premises. The parties must have understood, that although not recited in the exceptions, the physical facts thus ascertained might be considered as relevant on the question, whether this evidence should have been admitted. It was with this understanding that the judge finally ruled, that the outside land was not "sufficiently similar to the lot in question to be a fair standard of value." The respondent properly could have asked for a statement of the topographical differences upon which the ruling was based, and have urged that they were insufficient to show that the evidence was incompetent. No request, however, was made, and of his own volition the judge thereupon excluded the price, and directed the jury to disregard it. While from the record his judicial discretion would have been more wisely exercised if the jury had been permitted to consider the evidence, yet it cannot be held as matter of law that the exclusion was erroneous. *Perkins* v. *Stickney*, 132 Mass. 217.

Exceptions overruled.

D. Malone, (*G. S. Fuller* with him,) for the Commonwealth.

W. A. Buie, (*John R. Murphy* with him,) for the petitioners.

ELLEN D. LOONEY *vs.* JOHN L. SALTONSTALL & another, administrators with the will annexed.

Essex. March 8, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Interrogatories.

The limitation in R. L. c. 173, § 63, as interpreted in *Wilson* v. *Webber*, 2 Gray, 558, of the right to interrogate an adverse party given by § 57 of that chapter, so that such right did not include a right to a disclosure either of the facts by which or the medium through which the interrogated party proposed to prove his case, is not affected by St. 1909, c. 225, which amends § 57 by inserting in its place a provision giving a right to interrogate an adverse party "for the discovery of any facts and documents admissible in evidence at the trial of the action, except as hereinafter provided."

CONTRACT upon an account annexed against the defendants as administrators with the will annexed of the estate of Susan B.

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Cabot for the making of various dresses for the testatrix. Writ dated December 16, 1909.

The answer contained a general denial and an allegation of payment by the testatrix in her lifetime.

The defendant filed fifty-three interrogatories to the plaintiff, among which were groups of a similar character, each group referring to a different item in the account annexed to the declaration. These interrogatories were in substance as follows:

"Did you do any work for Susan B. Cabot [on the date mentioned in an item of the declaration?]

"If you answer 'Yes' to the preceding interrogatory, what work did you do and where did you do it?"

"If you answer 'Yes' to [a preceding] interrogatory [which inquired if the plaintiff had any agreement as to price to be paid for the work referred to in the item in question,] state in full the terms of the agreement as to the work done on the date in question, stating as fully as you are able, all that was said by you or Susan B. Cabot as to the work to be done, the price to be paid, and the time at which the payment was to be made.

"Did you have any conversation with Susan B. Cabot at any time, which would tend to explain the reason why she should not have paid for any work which you did for her [on the date in question] before her death?

"If you answer 'Yes' to the preceding interrogatory, state as fully as possible the time and place of said conversation, and what was said by you and Susan B. Cabot in the course of said conversation."

There also were the following interrogatories relating to the items in the account annexed as a whole:

"Do you know any facts which would tend to explain the reason why Susan B. Cabot did not pay in her lifetime for work which you did for her?

"If you answer 'Yes' to the preceding interrogatory, state fully all such facts which you know.

"If you answer 'Yes' to interrogatory [second above], state fully all such facts concerning which you have any information and the sources of your information."

"Will you, for the purpose of answering the . . . interrogatories, examine all your books of account, memoranda and

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other writings in your possession or control, or accessible to you?"

"Have you kept any books or memoranda showing your account with Susan B. Cabot since July 1, 1904?

"If you answer 'Yes' to the preceding interrogatory, in what form have you kept said memoranda or account, and where have you kept it?

"If you answer 'Yes' to interrogatory [second above], have you said memoranda now in your possession or control, or in the possession or control of your attorneys?

"Have you used said account or memoranda for the purpose of obtaining information in order to answer the foregoing interrogatories? Kindly attach the original of said account or memoranda referred to in this interrogatory or a true copy thereof to your answers to these interrogatories."

"Have you referred to any memoranda mentioned in the preceding interrogatories in your answers to the three preceding interrogatories? If so, please annex a full and complete copy of the memoranda to which you have referred."

The plaintiff refused to answer any of the interrogatories above described, stating as her reasons for refusing "that said interrogatories do not appear to have any application to the defendants' case as set forth in their answer; that they ask for evidence relating to the plaintiff's case and not to the defendants', and that they seek to ascertain the way and manner in which said plaintiff proposes to prove her case." The defendant moved that the plaintiff be required further to answer the foregoing interrogatories among others. The motion was heard by *Richardson*, J., who denied it as to the interrogatories above described; and the defendant alleged exceptions, which after the death of *Richardson*, J., were allowed by *Pierce*, J.

H. L. Sampson, for the defendants.

J. J. Higgins, (*A. A. Gleason* with him,) for the plaintiff.

RUGG, C. J. This case involves a construction of R. L. c. 173, § 57, as amended by St. 1909, c. 225, which substituted a new section, and which relates to interrogatories in civil actions.*

* R. L. c. 173, § 57: "The plaintiff, after the entry of the action, and the defendant, after answer, or in a real or mixed action, after plea, and before the opening of the trial on the merits, may file in the clerk's office or in the

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This amendment, although adverted to in *Grebenstein* v. *Stone & Webster Engineering Co.* 205 Mass. 431, 439, never has been interpreted. A comparison of the old with the new section reveals certain obvious and important changes. In the earlier statute parties were not quite on the same basis as to the time of filing interrogatories. The plaintiff could file them after the entry of the action, but the defendant could do so only after he had completed his pleadings. By the amendment, all parties stand on the same footing, and may file interrogatories after the entry of the action. The earlier statute confined the right of each party to inquiries aimed at the discovery of facts and documents material to the support of the contentions set up by his own pleadings. The amendment removes this definite restriction, and permits interrogatories as wide in scope as the issues presented for trial, subject, however, to the single limitation, "except as hereinafter provided." These words manifestly refer to R. L. c. 173, § 63, which provides in substance that no party shall be compelled by an answer to criminate himself or to disclose title to property not material in the trial, or "to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case." These words have been in our practice act without significant change since the matter was first dealt with in St. 1851, c. 233, § 106. The same is true of § 57 prior to its amendment in 1909, it having first appeared in § 98 of St. 1851, c. 233.

These two sections as they appeared in the practice act of the next year, St. 1852, c. 312, §§ 61, 69, were construed by Mr. Justice Bigelow speaking for the court, in *Wilson* v. *Webber*, 2 Gray, 558, who said, "the plaintiff may interrogate upon any matter material to the support of his case, and the defendant

office of a justice who has no clerk, or with a trial justice, interrogatories to the adverse party for the discovery of facts and documents material to the support or defence of the action."

St. 1909, c. 225: "Chapter one hundred and seventy-three of the Revised Laws is hereby amended by striking out section fifty-seven and inserting in place thereof the following: — *Section* 57. Either party after entry of the action and before the opening of the trial on the merits may file in the clerk's office or in the office of a justice who has no clerk or with a trial justice, interrogatories to the adverse party for the discovery of any facts and documents admissible in evidence at the trial of the action, except as hereinafter provided."

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upon those material to his defense. . . . Each party is to be confined to those matters which are material to sustain the case which he sets up by his pleadings; he is to be allowed to obtain, by interrogating his adversary, proofs of his own case, but not those which establish the case set up against him." See to the same effect *Wetherbee* v. *Winchester*, 128 Mass. 293, and *Davis* v. *Mills*, 163 Mass. 481. The statute of 1909 has modified the law as thus declared. Each party is no longer confined to matters strictly in support of his own case. He may inquire as to anything which would be competent in evidence, subject to the narrowing effect of § 63. The limiting words of that section material to this case prohibit interrogatories, the answers to which would disclose "the manner in which" the adverse party "proposes to prove his own case." As to the meaning of these words, it was said in *Wilson* v. *Webber:* "This provision is entirely inconsistent with the theory that by § 61 [now R. L. c. 173, § 57] a right was given to a party to seek by interrogatories a disclosure of the case that was to be set up against him; because such a right could not be exercised to any effective purpose under such a restriction as is imposed by § 69 [now R. L. c. 173, § 63]. It is difficult to imagine a question, relative to material facts in support of a case against a party, the answer to which would not necessarily involve a disclosure of the mode of its proofs." In terms this case holds that the manner in which a case is to be proved (as these words are used in the statute) mean the substance as well as the form by which a case is to be supported. It relates not merely to the medium of proof, but includes also the facts to be proved. This language and the amplification of interpretation given to this section in *Wilson* v. *Webber* have been left unaffected by the amendment of St. 1909, c. 225. The exception contained in its last clause in effect imports into its terms the provisions of § 63 as it had been interpreted by decisions of this court. *Wilson* v. *Webber*, still correctly states the law in this respect in view of St. 1909, c. 225. It has been said that the re-enactment without change of a statute, which has received previously a long continued executive construction, is a legislative adoption of such construction. *United States* v. *Hermanos y Compañia*, 209 U. S. 337, 339. *Komada* v. *United States*, 215 U. S. 392. The reason is all the stronger for the assumption that the interpretation given by

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the court of last resort to language employed in a statute is adopted and approved by the legislative department when that statute is re-enacted without substantial change. *Welch* v. *Boston*, 211 Mass. 178.

The result is that St. 1909, c. 225, has enlarged the time within which interrogatories may be propounded by any party to that intervening between the entry of the action and the opening of the trial on the merits, and that the scope of the questions which may be asked is as broad as the field which would be permitted if the person interrogated was called as a witness to testify orally in the actual trial, except as it is limited by the language of R. L. c. 173, § 63, according to its definition set forth in *Wilson* v. *Webber*, 2 Gray, 558, and other decisions following it. *Davis* v. *Mills*, 163 Mass. 481. *Spinney* v. *Boston Elevated Railway*, 188 Mass. 30, 37. *Robbins* v. *Brockton Street Railway*, 180 Mass. 51, 55. *Gunn* v. *New York, New Haven & Hartford Railroad*, 171 Mass. 417, 421. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527, 532.

The practical effect of the enlargement of the scope of inquiry wrought by the statute of 1909 is not easy to define. But for example it probably includes interrogation as to specific facts in contradiction of a definite claim set up by the adverse party, and as to which he has the burden of proof.

It is not feasible to do more than lay down the general rule and leave each case to be tested by it as occasion requires.

We understand that the defendants have not argued that their interrogatories should have been answered unless St. 1909, c. 225, has changed the effect of R. L. c. 173, § 63, as interpreted by *Wilson* v. *Webber*. But however that may be, a careful examination of the questions in detail does not show the commission of any error in the Superior Court. Either as disclosing the substance of the plaintiff's case, the means of its proof, as being immaterial, calling for the expression of an opinion, or the failure to answer being not harmful, the order was right in not requiring further answer.

Exceptions overruled.

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INSURANCE COMPANY OF NORTH AMERICA *vs.* FRANCIS WILLEY & another.

Suffolk. March 8, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Insurance, Marine. *Deceit. Contract*, Implied in law.

A policy of marine insurance on wool being shipped from Liverpool, England, to Boston contained the provision that the goods insured "are valued (premium included) at as per form attached . . . ." The form attached stated, "Valued, premium included, at $5.50 to the £ Sterling and if invoiced in American Gold at invoice and 10%." The policy also provided, "All risks to be reported as soon as known and amounts declared as soon as ascertained." U. S. St. of June 10, 1890, c. 407, § 3, among other things required of the shipper that he should make a declaration in writing before the United States consul that the invoice, which should be attached to that declaration, was in all respects correct and true. The shipper's invoice was false in overstating the value of the wool. The wool was lost under circumstances which rendered the insurance company liable and it paid the shipper a sum calculated on the basis of the value stated in the invoice and afterwards, in an action against the shipper for deceit and for money had and received, sought to recover the excess of that payment over what should have been paid if the invoice had been true. The defendant demurred. *Held*, that the policy of insurance was in form a valued policy, but that, in order for it to take effect as such, it was necessary that the insurer should be notified of an invoice such as was required by law; that in the absence of such an invoice the policy took effect as an open policy, and that therefore the plaintiff was entitled to recover the excess of payment.

TORT OR CONTRACT for an alleged over-payment of insurance. Writ dated October 20, 1911.

The declaration as amended was in four counts, the first and third counts being in tort for deceit, and the second and fourth in contract for money had and received by the defendants to the plaintiff's use. Essentially the same facts were alleged in all the counts, and they were as follows:

On June 27, 1908, the defendants shipped from Liverpool, England, to Boston five hundred and fifty bales of South American wool, which they had insured with the plaintiff under a policy which provided, "The said goods and merchandises, hereby insured, are valued (premium included) at as per form attached. . . ." The form attached contained the following: "Valued, premium

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included, at $5.50 to the £ Sterling and if invoiced in American Gold at invoice and 10%." Among provisions printed on the side of the policy was the following: " All risks to be reported as soon as known and amounts declared as soon as ascertained."

The shipment was under the provisions of U. S. St. of June 10, 1890, c. 407, § 3, (26 U. S. Sts. at Large, 131,) which among other things required of the defendants a declaration before the United States consul that the invoice which was attached to the declaration was in all respects correct and true.*

The invoice stated the value of the wool shipped as from eight and one quarter to fourteen and one half pence per pound. The allegation of the declaration was that the real value of the wool at Liverpool at the time of shipment was not more than seven pence per pound.

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* The section referred to reads as follows:

"Sec. 3. That all such invoices shall, at or before the shipment of the merchandise, be produced to the consul, viceconsul, or commercial agent of the United States of the consular district in which the merchandise was manufactured or purchased as the case may be, for export to the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof and of all charges thereon, as provided by this act; and that no discounts, bounties, or drawbacks are contained in the invoice but such as have been actually allowed thereon; and when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported; that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade, in the usual wholesale quantities, and that it includes all charges thereon as provided by this act; and the actual quantity thereof; and that no different invoice of the merchandise mentioned in the invoice so produced has been or will be furnished to any one; if the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser."

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There was a total loss by fire of the greater part of the wool under circumstances which made the plaintiff liable to the defendants for the loss suffered. The plaintiff, relying on the truth of the statements in the invoice, paid the loss in accordance with the values there stated, and in this action sought to recover the difference between the amount thus paid and the amount it should have paid.

The defendants demurred to the "amended declaration and each count thereof" on the ground that "the matters therein contained in manner and form as set forth are not sufficient in law for the plaintiff to have its action against the defendants."

The demurrer was heard by *Jenney*, J., who made an order overruling it and under R. L. c. 173, § 105, reported the case for determination by this court before further proceedings in the Superior Court.

R. Homans, (*A. G. Grant* with him,) for the plaintiff.

A. H. Russell, for the defendants.

RUGG, C. J. The plaintiff is a corporation doing marine insurance. The defendants are importers of wool. The plaintiff seeks to recover an alleged over-payment on a cargo of wool duly insured by it and destroyed by fire under circumstances rendering the plaintiff liable to the defendants on its contract of insurance. The pivotal question is whether the policy of insurance issued by the plaintiff to the defendants was a valued policy or an open policy. The difference between the two is this: A valued policy is one where the parties by the contract of insurance fix for the purpose of the risk a definite value of the property insured so that dispute on that subject is foreclosed for all time thereafter, except in cases of fraud or wager, no matter how high the valuation may be. *Coolidge* v. *Gloucester Marine Ins. Co.* 15 Mass. 340. *Irving* v. *Manning*, 1 H. L. Cas. 287, 307. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 6 Cranch, 206, 220. *Barker* v. *Janson*, L. R. 3 C. P. 303. An open or unvalued policy is one where the value of the property insured is not settled in the policy, and in case of loss must be agreed upon or proved. *Hemmenway* v. *Eaton*, 13 Mass. 107. The contract in the case at bar provided that "The said goods and merchandises, hereby insured, are valued (premium included) at as per form attached." These words, as far as they go, tend to indicate that the parties contemplated a valued rather than an open

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policy. But as no amount is stated in that immediate connection, they are indecisive. Reference is made to the form attached which contained these words: "Valued, premium included, at $5.50 to the £ Sterling and if invoiced in American Gold at invoice and 10%." The point to be decided is the fair meaning of these words. If after the word "Valued" in this clause only the rate of exchange had appeared, it would not have been a valued policy. It then would not have been a statement of value of the subject of the risk, but only a means of translating into United States money the unit of English money. To this effect is *Ogden* v. *Columbian Ins. Co.* 10 Johns. 273. While the expenses of insurance premiums are added to the true value at the place of shipment in an open policy and are not added to the stipulated value of the property in a valued policy, the use of the words "premium included" may be in explanation of the high rate of exchange for the English pound and the ten per cent added to the American valuation. Moreover, it is not unusual to state in valued policies of marine insurance whether the stipulated value includes or excludes the premium. *Mayo* v. *Maine Fire & Marine Ins. Co.* 12 Mass. 258. But the clause to be interpreted contains something more than the mere rate of exchange, in the words "at invoice." If these words were transposed and appeared directly after the word "Valued" the sense would have been plain that the invoice price with the rate of exchange fixed for the English pound and the percentage to be added to the American dollar was the agreed value of the property at risk. While it is not expressed with clearness nor with grammatical accuracy, more of the words can be given a reasonable effect if the clause is interpreted as fixing the value at invoice plus the additions stated than to hold the meaning to be no valuation at all. There was no sufficient occasion for referring to the invoice except for fixing value. This construction receives some confirmation from the clause printed on the side of the policy which required of the insured "All risks to be reported as soon as known and the amounts declared as soon as ascertained." There seems to be no reason for a stipulation for declaration of amount of risk as soon as it is learned except for the purpose of determining valuation. These considerations incline us to the conclusion that this was a valued rather than an open policy, and that the value agreed upon was that given in the

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invoice. There can be no agreement upon value, however, until the amount is actually known to both parties, the effect of which will be discussed later.

The question then arises as to the meaning of invoice value. The plaintiff alleges that the word as used in a contract of insurance to cover imports alone, as this one did, made in this Commonwealth means such an invoice as is required by U. S. St. of June 10, 1890, c. 407, (26 U. S. Sts. at Large, 131,) which governed all importations at the times of the events here in issue. That act provided in brief that no importation of merchandise exceeding $100 in value (with an exception not here material) should be made into this country, except upon an invoice and affidavit, which should show "the actual cost," if purchased, or if obtained otherwise, "the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which" the importation is made, verified by the oath of the owner or his agent. This act is general in its terms and applies to all importations of merchandise of every character. The use of the word "invoice" in the policy under these circumstances, in the absence of anything to show that there was any other invoice known or commonly employed in importations, must be held to refer to that required by this statute. Apparently this is not in dispute between the parties. The defendants claimed and received their payment upon presentation of a paper which purported to be such an invoice. The defendants contend, however, that the policy takes effect as a valued policy to the same extent by reference to the invoice as it would if the figures of the invoice had been written into the valuation clause. The plaintiff alleges that the reference to the invoice value meant not the figures actually written into the invoice, but such valuation as should have been written into a true and just invoice, which in its statement of value actually conformed to the terms of the federal act. The plaintiff further alleges that the defendants procured the payment to them of loss by presentation to it of an invoice showing values of wool ranging from eight and one quarter to fourteen and one half pence per pound, when in fact it was worth only seven pence per pound in the general markets of England, from which the importation was made, and that it relied upon the truth of this invoice in making the payment, and that the invoice in fact

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used by the defendants in making the importation was accompanied by that form of affidavit prescribed in § 5 of the act, which purported to state a faithful valuation of the merchandise at its "actual market value or wholesale price" in the principal markets of England whence the importation was made.

A valued policy is ordinarily one where the agreed value in terms of a money standard are written into the contract of insurance. It is still a valued policy, when the agreement by parties is that the value shall be fixed and defined by reference to some other instrument. Such an agreement must be based upon some standard certain in itself or capable of being made certain, and known to and accepted by both parties. It cannot be a valued policy, which by its terms means a value fixed by agreement, when the value is determined wholly by the volition of one party to the contract, and may be invoice based on value at place of lading or on expected value at place of import, including the anticipated profit and all intervening expenses. Where the reference in the policy for the standard of value is to a legal document, which by law has a fixed, definite and unchangeable method of ascertaining value, a value found by that standard, and by that alone, must be held to have been in contemplation of the parties. There could be no value stated in an invoice for importation save market value in the country of export. It is urged by the defendants that although the invoice may not have been in compliance with the federal statute, yet the value as stated in the actual invoice, when ascertained and declared to the plaintiff, became the agreed price for the purpose of the insurance. There is force in the argument. But the stronger reason appears to support the view that invoice meant the invoice required by law, a standard known to all parties. Otherwise, the insured would be enabled to fix any value, provided only he was willing to pay the premium. But this would greatly increase the moral hazard and the actual risk without giving the insurer any real knowledge of true value or of the sense in which value was used upon which to charge premium. *Carson* v. *Marine Ins. Co.* 2 Wash. C. C. 468, 470. It would put it in the power of the insured to fix absolutely the value while the whole theory of a valued policy is that parties on an equality have come to an understanding as to value. The declaration alleges that the invoice values did not comply with the federal

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statute in that they were far too high. Hence the invoice value did not comply with the contract of insurance. The policy was in form a valued one, but to be completed it required a declaration of value in accordance with its terms before the loss. In substance the policy was on goods thereafter to be declared and at the agreed value, namely, that shown upon such an invoice as the federal statute required. In order that such a policy may become effective as a valued policy, the invoice must be notified to the insurer before loss, although such notification is not a condition precedent to the right to recover on the contract of insurance. The policy could not become a valued policy until the information as to the invoice, which of necessity must come from the insured, had been communicated to the insurer. No such invoice price having been furnished by the insured, this policy never became operative as a valued policy. The rights of the parties, therefore, stand on the same footing as though no statement of invoice value had been made before the loss. In that event the policy would have been an open policy. *Harman* v. *Kingston*, 3 Camp. 150. *Gledstanes* v. *Royal Exchange Ins. Co.* 34 L. J. Q. B. 30. 1 Arnould on Marine Insurance, (7th ed.) § 360. That is the basis on which the rights of the parties must be settled. The invoice value furnished was not such an invoice as the contract required, and hence no value became known to the parties and fixed by the standard which they had adopted before it was too late to make it a valued policy.

The plaintiff's declaration sets out a cause of action to recover excess of payment of insurance above the amount which should have been paid under an open or unvalued policy of insurance.

Demurrer overruled; defendants to answer over.

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COMMONWEALTH *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Essex. March 11, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Street Railway. Constitutional Law.

A right to fix fares given to a street railway corporation by a special charter, subject under the general laws to alteration or repeal, is not impaired by a statute reasonably regulating the fares to be charged for the transportation of pupils of schools.

St. 1910, c. 567, provides that the rates of fare charged by street railway companies for "transportation of pupils of the public day schools or public evening schools or industrial day or evening schools . . . or private schools" in travelling between home and school "shall not exceed one half the regular fare charged," and imposes a penalty for each violation. A street railway company convicted on an indictment under this statute alleged exceptions to the submission of the case to the jury, and contended that upon the facts shown the statute in its operation failed to protect the defendant in the enjoyment of its property and deprived it of its property without due process of law contrary to the Constitution of the Commonwealth and that of the United States. The defendant, to show that it incurred a substantial loss on each pupil carried at half fare, relied on a computation based on the average cost of carrying a passenger, which was arrived at by dividing the amount of the operating expenses and fixed charges for a certain period by the number of passengers during that period. It appeared, however, that the defendant gained in the operation of its railway revenue from sources other than fares, and that it also had income from sources apart from operation, so that the operating expenses and fixed charges could not be treated as incurred wholly for the transportation of passengers. *Held*, that the charging of half fare, having been prescribed by the Legislature as a police regulation in the interest of education, was presumed to be reasonable and constitutional until shown to be otherwise, that it was not enough for the defendant to show that no profit might come from the particular service but that it must make it appear that in conjunction with all the service of the defendant the rate was unreasonable and was equivalent to spoliation, that the basis of the defendant's computation was indecisive and that it was not plain that the rate was confiscatory or that the defendant might not be in better condition by complying with the statute than by failing to do so, and that the case properly was left to the jury.

St. 1910, c. 567, is constitutional as a proper exercise by the Legislature of the police power.

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INDICTMENT, found and returned in September, 1910, charging the defendant with a violation of the provisions of St. 1910, c. 567, in refusing to sell to one Barker, a boy fifteen years of age, who was a pupil of the Lawrence Independent Industrial School, tickets in lots of ten for his transportation between the school house of that school and his home at a rate of fare not exceeding one half the regular fare charged by the defendant for the transportation of passengers between those points.

In the Superior Court the case was submitted to *Bell*, J., upon an agreed statement of facts. The defendant presented fourteen requests for rulings, in which it asked the judge to rule that the defendant did not appear to have been guilty of any offense at law, that the jury must return a verdict of not guilty, that St. 1910, c. 567, was unreasonable, that it was unconstitutional, and was unconstitutional as applied to the defendant, under various provisions of the Constitution of the Commonwealth and of the Constitution of the United States, the questions raised being stated in the opinion.

The judge refused to make any of the rulings requested, and left the case to the jury. The jury returned a verdict of guilty; and the defendant alleged exceptions to the refusal of the rulings and to the submission of the case to the jury.

B. W. Warren, (*C. R. Lamson & W. H. Stone* with him,) for the defendant.

H. C. Attwill, District Attorney, for the Commonwealth.

RUGG, C. J. The only question in this case is whether St. 1910, c. 567, is constitutional as applied to the facts appearing of record. This statute provides that the rates of fare charged by street railways for "transportation of pupils of the public day schools or public evening schools or industrial day or evening schools . . . or private schools" in travelling for attendance between home and school "shall not exceed one half the regular fare charged" for the transportation of other passengers between the same points. The constitutionality of R. L. c. 112, § 72, which made similar requirements as to pupils in public schools alone was upheld in *Commonwealth* v. *Interstate Consolidated Street Railway*, 187 Mass. 436; *S. C.* 207 U. S. 79. This section as amended by St. 1906, c. 479, so as to include pupils in private schools was considered in *Commonwealth* v. *Connecticut Valley Street Railway*,

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196 Mass. 309. It was held there that the intention of the Legislature as manifested by the act was to include only pupils of the public schools required by R. L. c. 42, §§ 1 and 2, for the education of children and youth, and in private schools of a like kind, and to exclude pupils of industrial and evening schools, and other private and public schools. The present act includes by express words those who attend industrial and evening schools maintained by the public.

The constitutionality of the statute is concluded by these decisions so far as objections rest on a denial of equal protection of the laws to the defendant because of exemption of the Boston Elevated Railway Company from the requirement of the statute, and on a denial of equal protection of the laws to members of the travelling public not included in its provisions. The circumstance that a larger number of persons are now within the scope of the statute makes no material difference. The class now as before is confined to those who are attending institutions for education chiefly provided at public expense. The factors of youth and size of pupils and hours of travel being when other travel was lighter, and probability of far greater travel at the less rate because of the financial limitations of scholars in schools were alluded to in 187 Mass. at 440, but they were not treated as determinative. The pivotal consideration was whether the grouping of pupils in schools as a class entitled to special consideration in matter of fares was reasonable or arbitrary, and that was decided in favor of the statute. The other considerations are not rendered inapplicable because by reason of the greater age of some who go to industrial schools the proportion of children in the favored class may be less.

The defendant has complied with the earlier fare statutes. But this complaint relates to a refusal, contrary to the requirement of the statute, to sell tickets to a boy fifteen years old, who was a pupil pursuing the regular course in mechanic arts in a public industrial school in Lawrence.

The statute does not impair, in contravention of art. 1, § 10 of the Constitution of the United States, the obligation of the contract set forth in the charter of the Lynn and Boston Railroad Company (St. 1859, c. 202, § 4), to which it is said that the defendant has succeeded. That charter when granted was liable by

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general law to alteration or repeal, Rev. Sts. c. 44, § 23, R. L. c. 109, § 3, and was therefore taken by consent subject to this condition, of which it cannot now be heard to complain. *Parker* v. *Metropolitan Railroad*, 109 Mass. 506. *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 199 Mass. 279. This reserved power of amendment is not exceeded, so long as the object of the grant is not defeated or essentially impaired and property and rights acquired upon the faith of the charter are not taken away. The charter right to fix fares is subject to amendment within this limitation. Moreover, no charter contract can prevent the Legislature from a valid exercise of the police power. *Texas & New Orleans Railroad* v. *Miller*, 221 U. S. 408, 414.

The defendant's chief ground of attack is that the agreed facts show that the statute in its practical operation fails to protect it in the enjoyment of its property and deprives it of its property without due process of law, contrary to the Constitution of this Commonwealth and of the United States. The governing principle of law in its general statement is well settled. The legislative rate must be so small as to occasion a loss to the carrier if it performs the service required for the price permitted before it can be held unconstitutional provided the total net earnings are such as to yield a reasonable return upon the value of the corporation as a whole, having regard to the fact that this is a burden imposed by a police regulation in the interest of education. It may be that a particular rate for a given carriage taken by itself would yield little or no profit, but, taken in conjunction with the entire transportation, would not be unreasonable. The circumstance that the defendant has earned and paid reasonable dividends (five per cent per annum since 1905 as stated by the defendant in its brief), while of weight is by no means decisive. It is not a question which commonly can be solved as a mathematical problem. It depends upon the consideration of several elements. It is a mixed question of law and fact. It must be determined solely as one of legislative power, and not as one of expediency or wisdom.

This case does not involve a general scheme of rates, but only that for a particular service. The inquiry is confined to the point whether a performance of a specified duty at the rate fixed is so inherently unjust and unreasonable as to amount to the depriva-

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tion of property without due process of law. It is not enough to show that no profit may come from the particular service, it must appear that in conjunction with all the service of the corporation the rate is unreasonable and is equivalent to spoliation. The presumption is that the rate fixed by the Legislature is reasonable. The onus rests on the carrier to show the contrary. Every proper assumption must be made in favor of the constitutionality of the statute, and it is not to be declared beyond the power of the Legislature unless it is free from all fair doubt. The case must be a very clear one before the courts will interfere with a legislative determination of rates. *Minneapolis & St. Louis Railroad* v. *Minnesota*, 186 U. S. 257, 264. *Knoxville* v. *Knoxville Water Co.* 212 U. S. 1, 18. *Lincoln Gas & Electric Co.* v. *Lincoln*, 223 U. S. 349, 357. *Wilcox* v. *Consolidated Gas Co.* 212 U. S. 19, 41. *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541. *Atlantic Coast Line Railroad* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428, 431, 432. As applied to this particular kind of case it was said in 187 Mass. at 439, that such a classification of passengers and regulation of their fares in the general interest of education might go to the extent of requiring the particular service to be done without profit, but it could not go so far as to impose expense "upon the street railway companies, or upon that part of the public which pays fares to street railway companies." The precise point is whether the agreed facts show that there is required of the defendant an expense for complying with the statute so clearly as not to warrant an opposite finding by the jury. It must be assumed that accurate instructions were given to the jury. Do the agreed facts, with the proper inferences which the jury could have drawn, warrant a general verdict of guilty? *Commonwealth* v. *Gordon*, 159 Mass. 8.

The facts upon which the defendant relies are that by dividing the total number of passengers carried for a definite period of nine months or a year into the operating expenses and fixed charges for the same period, it appears that the average cost of carrying each passenger is about four and one half cents, and that as its reasonable regular fare is five cents the result follows that to carry pupils at half fare or two and one half cents results in a loss of two cents for each pupil. Even if this was all there was to be

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regarded, it would not follow that compliance with the statute would cause the defendant a loss. It still might be that the number of pupils who ride at the reduced fare as compared with those who would not become passengers at the full fare, coupled with the preponderance of small children and the greater carrying capacity of each car for such passengers and the well known fact that the hours of attendance at school are not the rush hours of travel do not cause an actual loss. But these are not all the elements which must be considered. The jury were entitled to use their common knowledge. The agreed facts state that reference may be had to the reports of the Massachusetts Board of Railroad Commissioners and to the annual returns of street railway companies as printed by the commission, which includes the return of the defendant. From these sources it appears that the defendant gained substantial revenue from operation from other sources than fares. The letting of advertising space in cars, presumably including those in which school pupils are carried, and the carrying of mails, which may have been on the same cars, both yielded material amounts. It is obvious that the average expense to the company of carrying each passenger in terms of operating expenses and fixed charges, which includes as appears from the returns large sums for maintenance of roadway, buildings and equipment, or in other words in terms of total expense to the company, outside of additions to permanent assets, when compared with the rate for a single fare is not the test whether business is conducted at a loss. Other sources of revenue must be regarded than the rate of a single fare and the total revenue therefrom. In addition to the sources mentioned directly attributable to the cars in which passengers are carried is interest on deposits which is also an income in most part from fares. There are also rentals, tolls and miscellaneous earnings from operation. Moreover, operating expenses and fixed charges, which yield other revenue than fares from passengers, properly cannot be charged wholly to the cost of carrying passengers. The agreed facts contain other computations as to cost of passenger transportation in terms of operating expenses alone, and those plus certain items of fixed charges. But it is not necessary to examine them in detail. Hence it is manifest from these considerations that the basis upon which the defendant asked a verdict of not guilty is indecisive. It is

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not plain that the rate is confiscatory or that the defendant may not be in better condition by complying with the statute than if it does not. It may be noted in passing that similar obligations respecting fares have been accepted voluntarily by street railway companies, whose conditions as to population served and length of line were probably not more favorable than those of the defendant. *Clinton* v. *Worcester Consolidated Street Railway*, 199 Mass. 279.

The conclusion is that this statute is an exercise of the police power which does not transcend the right of the Legislature, and the requests for rulings were refused rightly.

Exceptions overruled.

COMMONWEALTH *vs.* JOSEPH GOLDBERG & others.

Suffolk. March 11, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Evidence, Admissions and confessions, Competency. *Constitutional Law*, Rights of defendant in criminal case. *Practice, Criminal*, Right of defendant not to incriminate himself, Minutes of proceeding before grand jury.

At the trial of an indictment it may be shown that a statement of a person concerned with the defendant in the commission of the crime, which tended to show the defendant's guilt, was read to the defendant when he was under arrest upon the indictment and that he replied in substance that he had nothing to say at that time, and such equivocal reply of the defendant may be found by the jury to have been in substance an admission that he could not deny the statement, but it is error for the presiding judge to leave it to the jury to say whether the defendant should have made a statement and whether his failure to do so aided them in coming to a conclusion as to his guilt or innocence.

At the trial of an indictment, where the Commonwealth has introduced evidence of the flight and avoidance of the defendant in another State in proceedings for his extradition, after he had been arrested and held on bail upon the charge in the indictment, the defendant may introduce evidence to explain his avoidance for the purpose of showing that it was due to a cause other than a consciousness of guilt.

A defendant in a criminal case has no right to require the production of the minutes of the testimony taken before the grand jury, who found the indictment against him, for the purpose of contradicting witnesses for the Commonwealth who testified before the grand jury. In the present case it did not appear that there were such minutes.

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INDICTMENT, found and returned on June 16, 1911, charging Joseph Goldberg, Jacob Goldberg, one Rothstein and one Krasowski with breaking and entering in the night-time the shop of one Ullian in Boston and the larceny of certain jewelry therein.

In the Superior Court the case was tried before *Ratigan*, J. Before the jury were impanelled the district attorney announced that the defendant Rothstein pleaded guilty and that the Commonwealth would not proceed against the defendant Krasowski, but would proceed against the defendants Goldberg alone. Subject to the exception of the defendants, the Commonwealth was permitted to show that statements made by Rothstein and Krasowski to a deputy superintendent of police and taken down by a stenographer were read to the defendants Goldberg when they were under arrest, and that those defendants, after having been instructed as to their rights, when asked whether they wished to make any statements, answered respectively, "I have nothing to say, but I am not making any statement now until I see a lawyer" and, "I could not tell any statement now," also that, when asked whether they wished to make any reply to a further statement made by Krasowski they answered respectively, "Not exactly now. I will wait a few days," and "I haven't anything to say." A portion of the judge's charge relating to this matter contained the following instruction: "At any rate, they were brought out when these statements were read and asked if they had anything to say with reference to the crime with which they were charged, and I believe in substance they both said they had nothing to say at that time. You are to consider the situation in which those men were placed. They had been brought back here to Boston, a long distance, charged with a serious crime; they were confronted with a man who was said to be an accomplice of theirs, and with another man who had aided them in disposing of some of the goods, or who had bought some of the goods from them, and certain statements were made to them. Now, as disinterested men, as honest men, as men who are to decide this case on the evidence as submitted to you, what would you say ought to have been the course of men who were innocent under those conditions? Should they have made a statement, or should they not have made a statement? Consider that question, gentlemen, in determining this

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case and see if it aids you in arriving at any conclusion as to the guilt or innocence of these defendants. Those statements were admitted for that purpose. Of course, they are not binding against these people. It is not an admission on their part, in other words, that they had committed the crime, except in so far as they were called upon under the circumstances to make or not make any statement in regard to it."

The offer of proof made by the defendants to explain their flight from New York, which is referred to in the opinion, was as follows: "I now will contend and show and prove that it was a conspiracy; that their flight from New York city was not an acknowledgment of their guilt, but because of a certain threat and certain advice given to them by their counsel, Moses Saxe, and due to his advice and threat and in fear of what he told them would happen, wrongfully intending to mislead these defendants so that they ran away from New York city." The evidence offered was excluded by the judge, subject to the defendant's exception. This evidence was offered during the cross-examination of one Duggan, a lieutenant of police of the city of New York, who was a witness for the Commonwealth.

The defendants made a motion for the production of the minutes taken before the grand jury for the purpose of contradicting witnesses for the Commonwealth who had testified before the grand jury. The motion was denied. It was stated by the counsel for the Commonwealth that no stenographer was present at the hearing before the grand jury.

The defendants asked for certain rulings, now not material, which were refused by the judge.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

W. R. Scharton, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth, submitted a brief.

SHELDON, J. We cannot say that the judge erred in admitting the written statements of Rothstein and Krasowski in connection with the answers made by the defendants when these written statements were read to them. The circumstances are very similar to those which were considered in *Commonwealth* v. *Spiropoulos*, 208 Mass. 71, 73; and the question was there so fully discussed that

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we need do no more than to refer to that case. But the charge of the judge with reference to this matter went further than was proper. The defendants were not under obligation to make any statement, and their failure to do so could not be considered against them. It was contended by the government that what they did say was not a bare refusal to make any statement or an unequivocal denial of the truth of what had been said by Rothstein and Krasowski, but might be found to have been in substance an admission that they could not deny those statements, and that what was therein affirmed was true. This was the ground upon which the statements were competent to be received in evidence, and this presented the question which should have been submitted to the jury. Instead of doing so the judge left it to the jury to say whether the defendants, who were then under arrest upon the indictment, should have made a statement, and instructed the jury to see whether that consideration aided them in coming to a conclusion as to the guilt or innocence of the defendants. This was erroneous.

The government introduced evidence of the flight and avoidance of the defendants when they had been arrested and held to bail upon this charge in another State upon proceedings for their extradition. This evidence was competent and material. It might have been found to warrant the inference that it was because of their consciousness of guilt that they sought to avoid a trial. But for that very reason it was competent for them to show, if they could, that the reason of their avoidance was not a consciousness of guilt, but that it was due to some other cause consistent with their innocence, and to show what that cause was. This was in substance what they offered to prove, and they should have been allowed to do so. And as they made a general offer of proof to this effect and it was rejected, it does not matter that the judge rightly excluded the particular question which was put to Duggan in cross-examination before the offer of proof was made. Nor was the error cured by the fact that the defendants themselves afterwards testified as to the circumstances and occurrences which preceded their flight. The ruling made does not appear to have been modified or reversed.

The defendants had no right to have the minutes of the testimony taken before the grand jury, if there were such minutes,

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produced for their inspection, or to read them to the jury. The ruling excepted to went no further than this.

None of the other exceptions can be sustained. Most of them have not been argued and may be treated as waived.

Exceptions sustained.

FRANKLIN SAVINGS BANK *vs.* INHABITANTS OF FRAMINGHAM.

Middlesex. March 12, 1912. — May 24, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Municipal Corporations, Officers. *Bills and Notes. Estoppel. Words*, "Corporation."

Before the enactment of St. 1910, c. 616, a town clerk had no duty whatever to perform in regard to notes of the town, and representations made by a town clerk before the passage of that statute that a certain note purporting to be the note of the town was a binding obligation, and a letter from him stating that the note was "correct in every particular," relying upon which a holder in good faith purchased the note, do not estop the town in an action brought against it by such holder from showing that the alleged note was not executed according to law because the signatures upon it of a majority of the selectmen were forged by the treasurer.

A town treasurer has no authority to bind the town by his indorsement of a note as treasurer in the name of the town.

In R. L. c. 73, § 59, relating to the indorsement of a negotiable instrument by a fiscal officer of a bank or corporation, the word "corporation" does not include a town or city.

No custom or usage can enlarge the authority of a town treasurer beyond the limits prescribed by statute.

CONTRACT by a savings bank against the town of Framingham as the maker and as the indorser of an alleged promissory note for $25,000 dated October 29, 1908, and payable on October 15, 1909, which is described in the opinion. Writ dated September 1, 1910.

In the Superior Court the case was tried before *Bell*, J. The facts which appeared at the trial are stated in the opinion. At the close of the evidence and when certain agreements as to the facts had been made by the parties, the judge ordered a verdict for the defendant, and by agreement of the parties reported the case and

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the questions of law arising therein for determination by this court.

M. Storey, (*R. G. Dodge* with him,) for the plaintiff.

A. Hemenway & E. H. Abbot, Jr., (*T. W. Proctor* with them,) for the defendant.

RUGG, C. J. This is an action of contract upon a promissory note of which the plaintiff is a holder for value in good faith before maturity. The note is in due form and purports to be signed by the treasurer of the defendant and countersigned by a majority of its board of selectmen. The issuance of such a note had been authorized by vote of the defendant. A note duly authorized and issued is valid if signed by the treasurer of a town and countersigned by a majority of its selectmen. R. L. c. 27, § 9. The signatures of the selectmen upon this note were forged by the treasurer, and the proceeds of the sale of the note were stolen. This is the only defense to the action. It is plain that because of the forgeries the note was not executed according to law. The plaintiff seeks to hold the defendant as maker on the ground that it is precluded from setting up the forgery by reason of representations made by its town clerk orally and in writing to the plaintiff to the effect that the note was a binding obligation of the defendant. Upon the note was a copy, in substance, of the article in the town warrant and a vote of the town meeting authorizing the borrowing of money. The town clerk also wrote to the plaintiff's treasurer that the note "is correct in every particular." Thereafter, the plaintiff purchased the note. The town clerk is not by statute or by-law of the defendant the official keeper of the records of the board of selectmen. There was evidence tending to show that the town clerk acted as "clerk to the selectmen," for which he received a small salary. But this did not constitute him legal custodian of its records. By R. L. c. 35, § 11, the board of selectmen was required to designate some person as its clerk and the evidence was uncontroverted that Herbert W. Damon, one of the selectmen, was so designated and attested its records. The town clerk did not attend the meetings of the selectmen, but copied the minutes made by Damon into a record book of the selectmen. This shows that the relation of the town clerk to the selectmen was that of scribe or copyist and not official record keeper or custodian of records. The board of selectmen having as official clerk one of their own

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number, the records were probably as matter of law in his custody for the time being and not in that of the town clerk. Moreover, it has been held that the minutes of the proceedings of selectmen are not town records. *Commonwealth* v. *McGarry*, 135 Mass. 553. *Attorney General* v. *Eastern Railroad*, 137 Mass. 45, 49. But in this instance the town clerk did not make a certified copy of any vote of the selectmen. He undertook to state a conclusion of law to the effect that the note was correct in every particular. That is something utterly beyond his power to do. It is his duty to record the votes of the town, but he is not required to insert in his records statements of facts or opinions which are not properly matters of record and if in this respect he goes beyond his duty, his statements do not bind the town. *Judd* v. *Thompson*, 125 Mass. 553.

The rule laid down in the Supreme Court of the United States is that a holder in good faith may assume that a certificate on the face of the note or bond, issued by a municipality, of the existence of the necessary facts precedent to its valid issuance, made by the officers charged with the duty of ascertaining those facts, is true, and that the maker will be held accordingly. *Warren* v. *Marcy*, 97 U. S. 96, 104. *Coloma* v. *Eaves*, 92 U. S. 484. *Evansville* v. *Dennett*, 161 U. S. 434, 443. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 265. *Presidio County* v. *Noel-Young Bond & Stock Co.* 212 U. S. 58. *Sherman County* v. *Simons*, 109 U. S. 735. *Comanche County* v. *Lewis*, 133 U. S. 198. These decisions do not reach the case at bar for the town clerk was not charged officially with the ascertainment of any facts touching this note. But it has been held with equal consistency and force by the same court that if the officers of the municipality are not clothed by law with authority to determine and certify the facts upon which validity of the obligations rest, then the municipality is not bound by their statement. Moreover, the limitations of power which inhere in the officers of New England towns as compared with town and county officers in other parts of the country, have been recognized by that court. *Dixon County* v. *Field*, 111 U. S. 83, 94. *Northern Bank* v. *Porter Township*, 110 U. S. 608, 617. *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 129. *Daviess County* v. *Dickinson*, 117 U. S. 657.

The town clerk had no duty whatever to perform as to notes of the town. His signature was not required in order to validate

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such notes. He was not bound by law to keep a record of notes issued. No legal obligation rested on him concerning its notes. The first statute which imposed any duty in this regard was St. 1910, c. 616, enacted since the events here under review. So far as he is the custodian of records, he is required to give certified copies. But he gave no certified copies in this instance, upon which the plaintiff relies in this aspect of its case. St. 1907, c. 343, as amended by St. 1909, c. 201, requires the original or copy of all contracts executed in behalf of a city to be filed with the city clerk. It is not necessary to discuss how far a city may be estopped to deny the validity of notes, copies of which are thus made a part of its public records, for that statute does not apply to towns. Unauthorized statements by town officers and those not made in the performance of some duty do not bind the town and are not admissible in evidence against it. *Burgess* v. *Wareham*, 7 Gray, 345. *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109. *Abbott* v. *North Andover*, 145 Mass. 484. *Brown* v. *Newburyport*, 209 Mass. 259.

The plaintiff seeks to hold the defendant as indorser of the note. It purports to have been made by the town of Framingham "To the order of its Treasurer." It bore upon its back the indorsement "John B. Lombard, Treasurer, Town of Framingham." Lombard had no authority to bind the defendant by his indorsement of a note. His authority to impose a financial obligation by way of incurring indebtedness is strictly limited by the statute. He had no power by virtue of his office as treasurer to make the town a responsible party on commercial paper. *Smith* v. *Cheshire*, 13 Gray, 318. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503. *Bradlee* v. *Warren Five Cents Savings Bank*, 127 Mass. 107. *Benoit* v. *Conway*, 10 Allen, 528. *Wormstead* v. *Lynn*, 184 Mass. 425.

The negotiable instruments act confers no authority upon a town treasurer to impose such liability upon his town. "Corporation" as used in R. L. c. 73, § 59, does not include cities and towns. *Donohue* v. *Newburyport*, 211 Mass. 561, and cases there cited. *Linehan* v. *Cambridge*, 109 Mass. 212.

No custom or usage can go to the extent of enlarging the authority of a town treasurer beyond the limitations prescribed by statute. *Wormstead* v. *Lynn*, 184 Mass. 425. *Abbott* v. *North Andover*, 145 Mass. 484. Evidence upon this point was excluded rightly.

Judgment on the verdict.

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EMELINE A. JACOBS, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Plymouth. March 12, 13, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Dangerous explosive, Proximate cause.

In an action by an administrator against a railroad corporation for the suffering and death of the plaintiff's intestate, a boy fifteen years of age, caused by the explosion of a railroad signal torpedo which was the property of the defendant, it could have been found that, while the plaintiff and other boys were lawfully at a station of the defendant, a train came into the station carrying in the baggage car a signal torpedo which through the negligence of the defendant's baggage master was allowed to fall upon the platform of the station, where it was picked up and carried away by one of the companions of the intestate, and that about ten days later when the same boys were trying to open the torpedo the intestate put it on a stone and struck it with his foot and the explosion occurred which caused his injuries and death. *Held*, that the defendant was not bound reasonably to anticipate the carrying away of the torpedo by one of the intestate's companions, and that the subsequent explosion could not be found to have been caused by the negligence of the defendant or of its baggage master.

TORT by the administratrix of the estate of Stephen Otis Jacobs, junior, for the suffering and death of the plaintiff's intestate, a boy fifteen years of age, caused by the explosion of a railroad torpedo belonging to the defendant. The plaintiff's substituted declaration contained two counts, the first at common law for the conscious suffering of the plaintiff's intestate alleged to have been caused by the negligence of the defendant, its agents and servants in permitting the torpedo to come into the hands of the intestate, knowing that it was a dangerous explosive and unmarked in any way to indicate its character, and the second count under St. 1906, c. 463, Part I, § 63, for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant or by the unfitness or gross negligence of its servants or agents while engaged in its business. Writ dated March 12, 1908.

In the Superior Court the case was tried before *Dubuque*, J. Facts which could have been found upon the evidence are stated in the opinion. The explosion occurred on March 31, 1907, and

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the plaintiff's intestate died on April 9, 1907. There was evidence that on March 22, 1907, the intestate with other boys was waiting about the defendant's station at Rockland for the purpose of seeing off some high school scholars who were going to Washington, that while they were there a train stopped at the station and the baggage master upon it put off a piece of baggage and that when he did so the torpedo, which was described as a tin disk wholly unmarked, fell to the platform, that one Turner, one of the intestate's companions, who was between nine and ten years of age, picked up the torpedo and put it in his pocket, that after the train had gone Turner showed the disk to the other boys, that by shaking it they could hear something rattle and they tried to open it with their knives to find out what was inside, that on the following Sunday, March 24, the boys were together and Turner found the disk in his pocket and produced it and the boys again tried to open it but without success, that on the Sunday after, which was March 31, the same boys were together after Sunday school, that Turner again found the disk in his pocket and the boys again tried to open it, and that finally Turner gave the disk to the plaintiff's intestate who put it on a stone and struck it with his right foot, when the explosion occurred. There was evidence that none of the boys knew that the disk was of a dangerous character.

At the close of the evidence, the defendant asked the judge to rule that upon the evidence the plaintiff was not entitled to recover either upon the first or the second count of her substituted declaration. The judge ordered a verdict for the defendant on each of the counts, and reported the case for determination by this court, with a stipulation of the parties which has become immaterial.

A. T. Smith, for the plaintiff.

F. W. Knowlton, (*R. B. Hull* with him,) for the defendant.

BRALEY, J. The injuries to the plaintiff's intestate which resulted in his death after a period of conscious suffering, were caused by the explosion of a railroad signal torpedo, the property of the defendant. It may be assumed, that the jury would have been warranted in finding upon the evidence the following facts: In the management of its business as a carrier of passengers, trains were provided with torpedoes, which whenever necessary were to be used by the flagman on the train ahead, to warn trains approach-

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ing from the rear, that a preceding train not very far distant was passing over the same track. The warning consisted in the noise of the explosion, as the on-coming train struck the torpedo, which the flagman affixed to the rail by straps forming a part of the apparatus. To be effective, not only the torpedo must be exploded by contact with the train, but the detonation must be sufficiently great to attract the attention of trainmen. The jury properly could infer from these circumstances, and from the testimony of the plaintiff's expert as to the character of the composition with which it was charged, as well as from the rule promulgated by the company, which was introduced in evidence, that the defendant knew, or by the use of due diligence should have known, that the torpedo contained a highly explosive compound. If exploded without proper precautions, or under extraneous conditions, pieces of the shell or case might fly with such force in various directions as to endanger the safety of persons in the vicinity. The use of a dangerous agency of this nature, which must be classed with gunpowder, and explosives like nitroglycerine, and dynamite in its various forms, while lawful, imposed upon the defendant the duty of taking every proper precaution to prevent personal injury to those lawfully upon the company's premises from explosions which might be precipitated through the carelessness of its servants. *Derry* v. *Flitner*, 118 Mass. 131. *Oulighan* v. *Butler*, 189 Mass. 287, 292. *Dulligan* v. *Barber Asphalt Paving Co.* 201 Mass. 227, 231.

The inquiry, accordingly, is whether the injury in question reasonably should have been anticipated by the defendant. *Obertoni* v. *Boston & Maine Railroad*, 186 Mass. 481. The train which came into the station where the intestate, a boy of fifteen years of age, and his young companions were waiting for the departure of friends, carried in the baggage car a torpedo to be used as a signal, which the jury could find was carelessly ejected by the defendant's baggage master and fell within the railroad location. The evidence having warranted a finding, that the intestate was not a trespasser, it would follow that, if from the impact of the fall or from the innocent intermeddling of bystanders whose presence might have been anticipated an explosion had followed, injuring him, the company as matter of law would not have been exonerated. *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray,

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64. *Bradford* v. *Boston & Maine Railroad*, 160 Mass. 392. *McKone* v. *Michigan Central Railroad*, 51 Mich. 601. *Illinois Central Railroad* v. *Hammer*, 72 Ill. 347. *Lane* v. *Atlantic Works*, 111 Mass. 136.

But the defendant was not bound to foresee, that one of the intestate's companions actuated doubtless by a boy's impulse and curiosity in which apparently the intestate shared, to possess and explode the torpedo, would remove it almost immediately from the premises, and that after the lapse of ten days the experiment would be tried in the vicinity of their homes, and the intestate, who participated, would be fatally injured by the explosion. *Denny* v. *New York Central Railroad*, 13 Gray, 481. *Quigley* v. *Clough*, 173 Mass. 429, 430. *Smith* v. *Peach*, 200 Mass. 504. *McDowall* v. *Great Western Railroad*, [1903] 2 K. B. 331. The accident is deplorable, but the wrongful asportation, which brought the intestate in contact with the exploding torpedo occasioned the mischief, and distinguishes the case at bar from *Lane* v. *Atlantic Works*, 111 Mass. 136, and the doctrine stated in *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341, 344. The injury not having been caused by its negligence, the presiding judge correctly ruled, that there could be no recovery under either count, and in accordance with the terms of the report judgment must be entered for the defendant on the verdicts.

So ordered.

GEORGE W. HUNT *vs.* BOSTON TERMINAL COMPANY.

Middlesex. March 13, 14, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. *Damages*, In tort.

An exception cannot be sustained to the refusal of a presiding judge to give instructions based on fragmentary and indecisive parts of the evidence.

In an action for the amount paid by the plaintiff for medical attendance upon his wife in consequence of injuries sustained by her by reason of the negligence of the defendant, it is right for the presiding judge to refuse to give instructions based on the assumption that the plaintiff can recover for the expenses only of

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such services as were necessary, because it may have been wise and proper at the time to incur expense for services which afterwards are shown to have been unnecessary.

In an action for the amount paid by the plaintiff for attendance of a physician upon his wife in consequence of injuries sustained by her by reason of the negligence of the defendant, if it is shown that the plaintiff used reasonable care in selecting the physician, that the bodily appearance of the plaintiff's wife resulting from the injuries and her honest statements of her feelings and sensations in view of the seriousness of the injury were such as might cause an attending physician to believe that a certain physical condition existed, and that the physician, so believing, gave treatment in accordance with his belief, including surgical operations, the plaintiff may recover a fair amount paid for the physician's services, although the supposed physical condition did not in fact exist and would not have been supposed to exist by a physician more skilful, experienced and highly trained, and even although the injuries might have been aggravated by the treatment given.

TORT for expenses alleged to have been incurred by the plaintiff in consequence of personal injuries sustained by his wife by reason of the negligence of the defendant on August 26, 1909. Writ dated January 25, 1911.

In the Superior Court the case was tried before *Bell*, J., together with an action by the plaintiff's wife for the injuries. The jury returned a verdict for the plaintiff in the sum of $625; and the defendant alleged exceptions, raising the questions which are stated in the opinion.

J. L. Hall, for the defendant.

E. P. Saltonstall, (*A. M. Beale* with him,) for the plaintiff.

RUGG, C. J. This is an action by a husband to recover compensation for expenses incurred by him in consequence of an injury to his wife occasioned by the negligence of the defendant. At the close of the charge there was a colloquy between counsel and the presiding judge in the hearing of the jury. The jury were instructed to treat what was then said by the judge to the counsel as said to them. In substance they then were told that it made no difference how much the plaintiff had paid for surgeons and physicians, he could recover only the fair value of such services so far as they were rendered in the treatment of physical ills resulting from the defendant's tort, and that he could not recover unless the services rendered were such that the doctors, if plaintiffs in an action against him, could recover, and that his right of action was measured only by his legal obligation to pay them. This was correct. It was assented to by the defendant. If anything inconsistent

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with this had been said earlier in the charge, this was the final statement of the judge and corrected anything to the contrary which had gone before. *Todd* v. *Boston Elevated Railway*, 208 Mass. 505. It seems to cover the whole field for which recovery was sought. It is doubtful whether under these circumstances the previous exceptions saved by the defendant were not waived. *McCart* v. *Squire*, 150 Mass. 484. *Muller* v. *Powers*, 174 Mass. 555.

But assuming that all the defendant's exceptions are open, no error is shown. The Superior Court rightly refused to give the requests for rulings presented by the defendant. They were all based upon fragmentary and indecisive parts of the evidence. Moreover, none were correct statements of the law, because they assume that the test is whether the services rendered in fact by the physicians were necessary. The event may have shown them to be unnecessary, and yet they may have been wise in the light of facts known at the time they were rendered.

The requests of the plaintiff as modified by the judge and the portions of the charge to which exceptions were taken were in accordance with *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 211, and did not go beyond it. The rule there stated is that where a person is injured by another's negligence, and uses reasonable care in selecting a physician to attend him and in following his directions, then the one guilty of negligence is liable for the resulting injuries even though a higher degree of medical skill might have minimized the injuries. If the appearance of the patient's body resulting from the defendant's wrong, together with an honest and fair statement of his feelings and sensations, are such as sometimes in common experience might cause an attending physician, selected in the exercise of reasonable prudence in view of the seriousness of the injury, to believe that a certain physical condition existed, and to give treatment in accordance with that belief, then the defendant will be responsible even though subsequent developments may demonstrate that the supposed physical condition in fact did not exist, and would not have been supposed to exist by a physician more skilful, experienced or highly trained, and even though the injury may be aggravated by the treatment in fact given. The causal connection is not broken under these circumstances, though one or even two surgical operations may have been performed. This was the sub-

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stance of the charge. The defendant did not by its requests for instructions ask for the converse of this proposition nor call attention to the court's failure to give it in the suggestions made at the close of the charge. There appears to be nothing in the case under these circumstances to call for the application of the rule of *Daniels* v. *New York, New Haven, & Hartford Railroad,* 183 Mass. 393, and *Snow* v. *New York, New Haven, & Hartford Railroad,* 185 Mass. 321, as to the intervention of a new wrong and the breaking of the causal connection between the tort of the defendant and the final condition of the injured person.

Exceptions overruled.

ANNIE E. HUNT *vs.* NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

GEORGE W. HUNT *vs.* SAME.

Middlesex. March 13, 14, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Railroad, Passenger. *Boston Terminal Company. Agency,* Existence of relation. *Negligence,* Railroad. *Joint Tortfeasors.*

One, who is waiting in the south terminal station in Boston outside a fence separating the tracks and the platforms between them from the rest of the station, and who has purchased a ticket and intends to board a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, is not a passenger of such railroad company.

The Boston Terminal Company which, in accordance with the provisions of St. 1896, c. 516, owns, operates and maintains the south terminal station in Boston, under § 8 of that statute made a rule that trainmen in the employ of one of the railroad companies which by the statute was compelled to use the station for its trains "will remain in charge of the train while passing over the track of" the Boston Terminal Company, and also made other rules governing the way in which the trains should be operated. *Held,* that the employees of the railroad company while they were in charge of a train of the railroad company in the station remained servants and agents of the railroad company, and that the railroad company was liable for the consequences of their negligent acts.

One, who was injured in the south terminal station in Boston as a result of confusion in a crowd waiting there for a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, when the train in backing into its place in the station ran over a bumper at the end of the track, broke down a fence separating the track area from the crowd and ran into the crowd,

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brought two actions, one against the Boston Terminal Company and the other against the railroad company, and the actions were tried together. Under §§ 8 and 9 of the statute and rules adopted by the Boston Terminal Company, trains in the station were operated solely by that company, but they continued in charge of the employees of the railroad company owning them, whose duty it was to operate them under the rules of the terminal company. There was evidence of negligence of the terminal company, and also evidence tending to show a violation, on the part of the employees of the railroad company who were in charge of the train, of the rules of the terminal company and a careless management of the train. The trial judge ruled, subject to exceptions by the plaintiff, that the plaintiff could recover in only one of the actions. The jury found for the plaintiff in the action against the terminal company, and for the defendant railroad company. *Held*, that the exceptions should be sustained, because there was evidence of negligence on the part of both defendants which concurred to cause the plaintiff's injury.

Where, at the trial together of two actions by the same plaintiff against different defendants for personal injuries caused by concurring negligence of the defendants in the two actions, the presiding judge wrongly rules that the plaintiff can recover in but one of the actions, and the plaintiff receives a verdict in one of the actions and in the other a verdict is returned for the defendant, the plaintiff is prejudiced by the error and an exception by him should be sustained.

RUGG, C. J. These are two actions of tort, both of which were tried* together with two similar actions brought by the same plaintiffs against the Boston Terminal Company. The action of Annie E. Hunt, (who will hereafter be referred to as the plaintiff) is for the recovery of damages for personal injuries sustained by her, and that of George W. Hunt, who is her husband, for his expenses in consequence of the injury to his wife. There was evidence tending to show that the plaintiff, having bought a ticket of the defendant for transportation over its line of railroad on a special train, was waiting in the south terminal station in Boston for the train on which the ticket entitled her to ride. The excursion train, instead of stopping at the usual place upon the track, came through the bumper and fence at the end of the track about ten feet into the space reserved for passengers.† In the resultant confusion among the waiting crowd, the plaintiff was thrown down and received injuries. The south terminal station and all tracks converging there for a distance of about half a mile were owned by the Boston Terminal Company, a corporation organized under St. 1896,

* Before *Bell*, J.

† It appeared that the plaintiff was waiting outside the fence, the gate leading to the space beside the track being closed.

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c. 516, and all trains, cars and engines were operated over the tracks so owned solely by the Boston Terminal Company. The New York, New Haven, and Hartford Railroad Company used the south terminal station in accordance with St. 1896, c. 516,* as the Boston terminal for its trains, and the locomotive and cars which ran over the bumper on the day in question were the property of the New York, New Haven, and Hartford Railroad Company. Among the rules of the Boston Terminal Company in force respecting its station at the time were these:

"Conductors, enginemen and other trainmen in the employ of the company owning or operating a train will remain in charge of the train while passing over the track of this company.

"In backing train into station great care must be exercised by enginemen and men in charge of train not to strike bumping-post or cars that may be standing on track.

"The train must come to a stop ten feet away from bumping-post or stationary cars before backing up to proper position.

"In addition to these rules, trainmen, enginemen and other

* The sections of this statute which relate to the operation of trains in the station and to the control of the station are as follows:

"Section 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and a hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law.

"Section 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the Supreme Judicial Court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for as may be reasonably necessary for their respective use."

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employees will comply with the rules or special orders of their respective companies when such do not conflict with the rules of this company."

The plaintiff contends that she was entitled to an instruction to the effect that she had the rights of a passenger against the present defendant. Ordinarily, one who has bought a ticket of a railroad company and is waiting for the train in the station, either of the company, from whom the ticket was bought, or of another company whose station the first company is using voluntarily, is a passenger and entitled to all the protection of a passenger. This general rule does not apply in its full scope to the Boston terminal station as was decided in *Frazier* v. *New York, New Haven, & Hartford Railroad*, 180 Mass. 427. It was held there that the railroad companies using that station have no option respecting it, but are compelled by act of the Legislature to use it and that the effect of the statute is to require the railroad companies using "a union station owned and operated by a separate corporation" to "deliver its passengers to the care of the owner of the union station and that" the railroad company's liability to its passenger "is at an end when the passenger alights in safety from its cars on to the platform of the station of the terminal company." Although the facts in that case were nearly the converse of those presented in the present case, the governing rule of law must be the same. The rights of a passenger do not accrue to one, having a ticket and intending to board the train of a railroad using the station, earlier than the moment when standing upon the platform adjacent to the train the ticket holder is about to step upon the train. The plaintiff was not, therefore, entitled to the protection of a passenger as against the present defendant. The reasons for this are set forth at length in the Frazier case and need not be repeated.

The trial judge instructed the jury, subject to the plaintiff's exception, that she was not entitled to a verdict against both the railroad company and the terminal company, and left it to the jury to say which one of the two corporations caused her injury. Plainly there was evidence as to the negligence of the terminal company, and the verdict of the jury has settled that its negligence was a cause contributing to the plaintiff's injury.

The question whether a railroad company using the south

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terminal station can be held responsible for an accident occurring while its trains are being drawn over the tracks of the terminal company was left undecided in *Frazier* v. *New York, New Haven, & Hartford Railroad*, 180 Mass. 427, 431. That point is now presented for decision. Sections 8 and 9 of St. 1896, c. 516, give to the terminal company authority to make reasonable rules and regulations for the use of the station and its approaches, which shall be binding upon the corporations using the same. Therefore the rules which have been quoted were binding upon the defendant railroad. Although the trains were operated by the terminal company, its rules required all trainmen, including the engineers of the several railroad companies, to continue in charge of each train while passing over the tracks of the terminal company. The effect of this rule was not to suspend their employment by the railroad companies, and to transfer them wholly into the service of the terminal company during the period when the train was upon its tracks. The rule does not purport to go so far. The servants of the several railroad companies remain their servants under the responsibilities of their general employment. There is super-added to their duties as railroad employees the obligation to observe the rules and to obey the directions of the terminal company as to the management of trains while upon the terminal company's property. The signals and switches, which regulate the movements of trains into and out of the terminal station, are in the charge of the terminal company, and in this sense all trains are operated solely by it, but the specific control of a locomotive belonging to the defendant coming into the terminal station still remains in its servants and agents, and its employees are subject to all its rules and orders so far as they do not conflict with the rules of the terminal company. Its trains are in the custody of its own servants and are manned by them, although the general direction of their movements is vested in the terminal company. These being the respective duties and obligations of the terminal company and the defendant, there was evidence enough to support a finding that the negligent act of the defendant's servants, either in applying too much power from the locomotive or in driving the train at too high speed against the bumper or in failing properly to inspect the brakes and other appliances for governing the train, may have concurred with the negligent act of the terminal company

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in giving signals for the speed of the train and its position in the station, to produce the derailment and panic which resulted in the plaintiff's injury. *Corey* v. *Havener*, 182 Mass. 250. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. *D'Almeida* v. *Boott Mills*, 209 Mass. 81.

The case does not necessarily present the instance of a general employer who lends his servant absolutely and unqualifiedly into the service of another so that the latter becomes in fact the master, concerning direction of all his movements and conduct. Hence, *Coughlan* v. *Cambridge*, 166 Mass. 268, 277, and *Rourke* v. *White Moss Colliery Co.* 2 C. P. D. 205, are not decisive.

The facts call rather for the application of the principle illustrated by cases like *Driscoll* v. *Towle*, 181 Mass. 416; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, and *Waldock* v. *Winfield*, [1901] 2 K. B. 596, where a servant remains in the general employ of the defendant, who hires, discharges, pays and, except as required by the terms of a definite arrangement giving a qualified authority for certain purposes to another, has the direction of his conduct. In such case the general employer may be liable for the negligence of the servant. It is akin to the cases where the owner of a horse and vehicle or of an automobile lets the instrument of carriage, together with driver or chauffeur, to another, who has the power of direction as to the route of travel. Responsibility still remains for most purposes in the general employer. *Hussey* v. *Franey*, 205 Mass. 413. *Shepard* v. *Jacobs*, 204 Mass. 110. Each case turns upon the terms of the agreement between the two employers. There is nothing in the nature of things which prevents both being responsible. A negligent order and a negligent execution of the order may concur in causing harm to a third person. In such case the sufferer may hold both the one responsible for the order and the one responsible for its execution and collect his compensation where he chooses from among those liable. The present case belongs to that class. It was error to rule that a verdict could be found against one only of the two defendants. *Cain* v. *Hugh Nawn Contracting Co.* 202 Mass. 237. *Berry* v. *New York Central & Hudson River Railroad*, 202 Mass. 197.

The plaintiff cannot be said to have suffered no injury by reason of this misdirection. The recovery of the judgment against the terminal company without satisfaction is no bar to the recovery

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of the judgment against the defendant, whose wrongful act may have been found concurrently to have contributed to the plaintiff's injury. *Cameron* v. *Kanrick*, 201 Mass. 451. The trial judge did not pursue the policy of submitting a special question to the jury to find the damages of the plaintiff, as was done in *Burke* v. *Hodge*, 211 Mass. 156, and therefore the plaintiff is entitled to a new trial against this defendant upon all issues.

Exceptions sustained.

E. P. Saltonstall, (*A. M. Beale* with him,) for the plaintiffs.

J. L. Hall, for the defendant.

SHAWMUT COMMERCIAL PAPER COMPANY *vs.* BENJAMIN H. CRAM & another & trustees.

Suffolk. March 14, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Judgment. Trustee Process, Adverse claimant.

Where, in an action of contract brought by trustee process in the Superior Court, an agreement for judgment has been made between the plaintiff and the defendant, and on the first Monday of a month, after interrogatories of the plaintiff to the only remaining trustee have been answered, a motion to charge such trustee has been allowed, the action on that day goes to final judgment under R. L. c. 177, § 1, and Rule 23 of the Superior Court; and thereafter that court has no jurisdiction to allow a motion to vacate the order charging the trustee *nunc pro tunc* as of the day it was made, nor to allow the filing of a petition under R. L. c. 189, § 32, by one asserting an adverse claim to the property in the hands or possession of the alleged trustee.

After final judgment in an action brought by trustee process, one claiming goods, effects or credits in the hands of a supposed trustee in the action cannot be admitted as a party for the purpose of establishing his claim under R. L. c. 189, § 32.

RUGG, C. J. This is an action of contract brought by trustee process. Agreement was made for judgment against the principal defendant, and the case continued pending disposition as to those summoned as trustees. All of these, except the Somerville National Bank, were subsequently discharged. That bank filed an answer and made replies to interrogatories, and after hearing it was

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charged as trustee by order of court on Monday, May 1, 1911. On May 4 there were filed by the trustee a motion to vacate the order charging it and a petition by one Bartlett that he be adjudged the owner of the goods and effects in the hands of the trustee. These motions were both allowed, that of the trustee being granted *nunc pro tunc* as of May 1, 1911; and the plaintiff appealed. Thereafter the plaintiff filed a motion to dismiss the petition of Bartlett as claimant on the ground that final judgment had been entered, and the court was without jurisdiction to entertain it. The plaintiff excepted to the denial of this motion. Thus the record stood when the exceptions were allowed.

1. The Superior Court obviously did not understand that the case was ripe for final disposition at the time of the allowance of the exceptions, for it had not passed upon the merits of the motion of the claimant, Bartlett. It is familiar practice that exceptions cannot be entered as of right in this court until the case is ripe for final judgment. *Brooks* v. *Shaw*, 197 Mass. 376, and cases cited at 379. *Crossin* v. *Beebe*, 186 Mass. 472. *West* v. *Platt*, 124 Mass. 353. Nor can an appeal from an interlocutory ruling be entered until then. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31. However, as upon the view we take, final judgment in truth had been entered, the case is treated as properly here. *Lowd* v. *Brigham*, 154 Mass. 107.

2. After the Superior Court had decided, by its order of May 1, that the trustee be charged, nothing further remained to be done by the parties as precedent to the entry of judgment. As May 1 was the first Monday of May, under R. L. c. 177, § 1, and Rule 23 of the Superior Court, the case then went to final judgment. *American Wood Working Machinery Co.* v. *Furbush*, 193 Mass. 455, 457. *Wallace* v. *Boston Elevated Railway*, 194 Mass. 328, 333. *Pierce* v. *Lamper*, 141 Mass. 20. This being final disposition of the case, it was beyond the jurisdiction of the Superior Court to vacate its judgment on mere motion. No clerical error had been committed. Other remedies are provided for the correction of errors of substance. *Karrick* v. *Wetmore*, 210 Mass. 578, and cases cited. R. L. c. 193. It is urged, however, that this principle does not apply to the petition of a claimant to have his rights established in trustee process under R. L. c. 189, § 32, where it is provided that such person may be admitted as a party for the purpose of deter-

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mining his title to goods, effects and credits in the hands of the alleged trustee. *Boylen* v. *Young*, 6 Allen, 582. While no time is prescribed within which a claimant may be admitted as a party, it is plain that it must be at some time before final judgment. The case cannot always be kept open for this purpose, and in reason the limit must be not later than the time when it has been disposed of finally. He must come into some live proceeding. See *Mortland* v. *Little*, 137 Mass. 339.

The liability of the trustee, although charged, is not made absolute by judgment in the original action. It can be established finally and enforced only by *scire facias* under R. L. c. 189, §§ 45 to 49. The claimant may be admitted as a party to such proceeding, and there assert his demand. *Knights* v. *Paul*, 11 Gray, 225. There is no indication in the record that the rights of the claimant and of the trustee may not be fully protected in such proceeding. It is not necessary to discuss to what extent the rights of either may be affected in instances where, without knowledge of any adverse claim and without fault of any one, the person holding goods, effects or credits in truth belonging to some one other than the principal defendant has been adjudged trustee. See *Randall* v. *Way*, 111 Mass. 506; *Wardle* v. *Briggs*, 131 Mass. 518.

It follows that the plaintiff's exceptions should be sustained and the several orders of the Superior Court vacating its order charging the trustee and admitting the claimant as a party and denying the plaintiff's motion to dismiss his petition should be reversed, and the order charging the trustee be affirmed.

So ordered.

The case was submitted on briefs.

C. W. Ford, E. M. Schwarzenberg & W. F. Frederick, for the plaintiff.

E. R. Anderson & J. G. Bryer, for the claimant Levi S. Bartlett.

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HELEN KOUYOUMJIAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.
ZABELL TAHNIZIAN *vs.* SAME.
DICKRAN TAHNIZIAN *vs.* SAME.

Suffolk. March 15, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway.

At the trial of an action by a woman against a street railway company for personal injuries caused by a street car of the defendant running into the plaintiff, it appeared that in the forenoon of a clear day the plaintiff, holding by the hand a granddaughter four years of age and followed by her daughter and another grandchild, was about to cross upon a cross walk a street upon which the defendant maintained double tracks, that the plaintiff had an unobstructed view of the tracks for a considerable distance, that she saw no car approaching on the farther track and, seeing one approaching on the nearer track, waited for it to stop on the cross walk, when, with nothing to distract her attention or to interfere with her freedom of movement, she started forward, that her daughter, seeing a car approaching on the farther track, called to her not to go, but that she continued forward around the standing car and was struck at once by a car on the farther track. There was evidence that, in violation of a rule of the defendant, no warning gong was rung on the car which struck the plaintiff. *Held*, that as a matter of law the plaintiff was not in the exercise of due care.

THREE ACTIONS OF TORT, the first two for personal injuries alleged to have been caused by the negligent running into the plaintiff of a street car of the defendant near a cross walk at the intersection of Westville Street and Geneva Avenue in that part of Boston called Dorchester; and the third by the father of the plaintiff in the second, a girl about four years of age when injured, for the loss of her services and for expenses caused by her injury. The writs in the first two actions were dated December 17, 1907. That in the third was dated December 22, 1908.

In the Superior Court the cases were tried together before *Dana*, J. There was evidence that, in violation of a rule of the defendant, no warning gong was rung on the car which struck the plaintiff in the first case. Other facts are stated in the opinion.

At the close of the plaintiffs' evidence the judge ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

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W. B. Grant & H. E. Whittemore, for the plaintiffs, submitted a brief.

E. P. Saltonstall, for the defendant.

BRALEY, J. It is stated in the exceptions that the parties agreed, that if in the first case the plaintiff was not entitled to recover the actions cannot be maintained, and the question is, whether at the time of the injury there was any evidence for the jury of the due care of Helen Kouyoumjian. Accompanied by her daughter and two grandchildren of tender years the plaintiff stood on the sidewalk, in the forenoon of a clear day, where for a substantial distance she had a full and unobstructed view of the defendant's tracks. The group intended to pass over the cross walk to the other side of the street, and having seen, as she testified, only an outward bound car approaching, the plaintiff waited until it stopped just upon the cross walk. While the car was at rest the plaintiff, leading one of the grandchildren by the hand and followed by her daughter with the other grandchild, started to go over the cross walk. The inward track where cars might be expected to pass at frequent intervals was before her, and she must have been aware that her view of a coming car would be obstructed to some extent by the stationary car. It appears from her testimony, that after leaving the sidewalk, and with nothing to distract her attention or to interfere with her freedom of movement, she proceeded on her way without again looking for approaching cars, and from the uncontradicted evidence of her daughter, that, seeing the oncoming car as her mother came to the inward track, she called to her, "Don't go." But in disregard of the dictates of ordinary prudence, and in despite of the warning, she seems to have taken no thought whatever for her own safety, and stepped upon the track when almost immediately she was struck and injured by an inbound car. The plaintiff's conduct under these conditions precludes recovery, and, the verdicts for the defendant having been rightly ordered, the exceptions must be overruled. *Haynes* v. *Boston Elevated Railway*, 204 Mass. 249. *Kennedy* v. *Worcester Consolidated Street Railway*, 210 Mass. 132.

So ordered.

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HORACE S. HOMER *vs.* FREDERICK E. SHAW.

Suffolk. March 15, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Rescission, Performance and breach. *Assignment.*

In an action of contract against a building contractor the plaintiff alleged that he was the assignee of a sum of money which the defendant owed a subcontractor. At the trial of the action before a judge without a jury there was evidence tending to show that the subcontractor had made a contract to do certain construction work for the defendant and that the plaintiff lent money to use in performing the contract to the subcontractor, who assigned to the plaintiff as security all sums due and to become due to him under the contract, and that the assignment was "accepted" by the defendant in writing; that thereafter because of lack of funds the subcontractor informed the defendant that he would have to "give the job up," and the defendant agreed with him that he should go on with the work, that the defendant should pay his debts already incurred for labor and material, should advance what money was necessary for the remainder of the work and should pay him $25 per week for his services in superintending the work and for the use of his tools. The work which originally the subcontractor had agreed to do then was completed without any ostensible change in the relations of the defendant and the subcontractor. The action was for an amount alleged to have become due to the subcontractor under the original contract after the date of the new arrangement between the defendant and the subcontractor. The judge found for the defendant. *Held*, that the facts warranted a finding that the original contract had been rescinded by the new arrangement between the defendant and the subcontractor, and that therefore the judge's finding was warranted.

CONTRACT by the assignee of the rights of one George A. Lancaster under a contract with the defendant under which he was to be paid for certain excavating and mason work and the setting up and riveting of the iron work of a section of the Tremont Street subway in Boston, the defendant being the general contractor for the construction of that section for the transit commissioners. Writ dated August 27, 1896.

The case previously was before this court and is the second case referred to in 177 Mass. 1, 5, where it was decided that the plaintiff could not maintain an action upon a *quantum meruit*, because Lancaster voluntarily had broken his contract with the defendant. After that decision the plaintiff was allowed to file a substituted

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declaration in which he alleged that Lancaster's contract with the defendant was fully performed.

The case then was heard by *Raymond*, J., without a jury. There was evidence tending to show the following facts: Lancaster began performance of his contract with the defendant soon after June 1, 1896. On or about June 13, being in need of funds to pay his men and for other expenses of carrying out his contract, he applied to the plaintiff, showing him certain letters which had passed between him and the defendant regarding the terms of their agreement and stating that the letters contained the terms of his contract with the defendant. Relying on the terms of the contract as set forth in those letters, the plaintiff advanced to Lancaster the sum of $140.05 and agreed to make the further advances that might become necessary for the payment of labor bills for the three following weeks, in consideration of which Lancaster agreed to divide the profits accruing to him under the contract equally with the plaintiff. Under the terms of this agreement the plaintiff advanced to Lancaster in weekly payments sums amounting in all, including the first payment, to $1,010.83, which amount was received by Lancaster and applied by him to the payment of bills for labor incurred in the performance of his contract with the defendant. On or about June 27, 1896, in order to secure the plaintiff for his advances Lancaster executed and delivered to him the assignment of the amounts due and coming due to him under his contract with the defendant. This assignment was sent to the defendant for acceptance and was accepted by him in writing. On July 18 the plaintiff gave to Lancaster a check to be used in making his weekly payment for labor under his contract and afterwards stopped payment of it. Thereupon on July 20 Lancaster wrote to the defendant: "Owing to my peculiar financial circumstances it will be impossible for me to go on with the iron work on the subway and shall have to give the job up." On the same day the defendant and Lancaster met and it was agreed between them, at the defendant's request, that Lancaster should go on with the work and that the defendant should pay his debts for labor and material already incurred in carrying out the contract, and should advance the money necessary in the future to pay for labor and material used in completing the work, and should pay the further sum of $25 per week to

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Lancaster personally. The defendant testified that the former contract was entirely rescinded and that he employed Lancaster to complete the work at a weekly salary of $25 per week for his services in superintending the work and for the use of his tools, and that the defendant thereafter assumed the entire responsibility of the work, including the payment of the men and the cost of materials without further accountability to Lancaster, except that he promised Lancaster that if he completed the work to his satisfaction and got rid of the plaintiff's claim and any other claims and suits, he would allow Lancaster the difference between what it might cost the defendant to complete the job, including all costs and expenses, and the contract price of $6 per ton. An auditor, Charles M. Reed, Esquire, to whom the case was referred before it was before this court the first time, and whose report was in evidence at the second trial, found "that this new arrangement was in effect a rescission of the original contract and the substitution of a new and radically different one for it, and that the rights of the plaintiff under his assignment did not extend to the sums payable to Lancaster after this date."

The plaintiff asked for the following rulings, which were refused.

"1. The letter of July 20, 1896, is not equivalent to an abandonment of the contract, and did not justify the defendant in rescinding the contract to the injury of the plaintiff.

"2. There is no evidence to show such abandonment of the contract by Lancaster as will deprive the plaintiff of his rights under the assignment."

"7. The arrangement which it is claimed was entered into on July 20, 1896, between the defendant and said Lancaster was not an abandonment or cancellation of the existing contract between the parties, but only a change in the terms of payment, and, since Lancaster had fully performed the contract up to that day, the defendant, having accepted the assignment to the plaintiff, could not, by entering into a different arrangement with Lancaster, deprive the plaintiff of his rights under said assignment, or by payments to Lancaster or his creditors reduce the amounts coming due for work done.

"8. Lancaster owed no duty to the defendant under his contract with the defendant to pay his, Lancaster's employees, and his failure so to do, and still less his announcement of his inability

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so to do, in the absence of an actual cessation of the work, affords no legal justification to the defendant for treating the contract as abandoned or for rescinding the same.

"9. The announcement by Lancaster on July 20, 1896, that he would 'have to give the job up' was not a breach of any duty which he owed to the defendant under his contract, and unless there was an actual breach of the contract, the defendant had no legal right to rescind the same without the consent of the plaintiff."

The judge found for the defendant; and the plaintiff alleged exceptions.

C. F. Lovejoy, for the plaintiff.

J. E. Young, for the defendant, was not called upon.

BRALEY, J. The defendant's liability upon acceptance of the assignment depended upon the assignor's performance of his contract to transport, erect and paint the steel work required for a section of a subway which the defendant was building in accordance with the plans and specifications of the transit commissioners. If not fully performed the entire contract price although payable in monthly instalments never became due, or if before completion the assignor by reason of his inability to go on, voluntarily abandoned the work, he could not recover for work and labor already performed and furnished. *Homer* v. *Shaw*, 177 Mass. 1. *Burke* v. *Coyne*, 188 Mass. 401, 404. *Buttrick Lumber Co.* v. *Collins*, 202 Mass. 413, 420. After the assignor entered upon the performance of the contract he informed the defendant, that owing to the failure of the plaintiff to advance money, which apparently he had agreed to furnish, he would be unable to complete the work as his workmen had not been paid, and if their wages remained in arrears they would leave his employment. The evidence, if no further action had been taken by the parties, and performance of the work had ceased, would have warranted a finding, that, the assignor having repudiated or abandoned his contract before the first instalment of the contract price became payable, the defendant would not have been indebted to the plaintiff. *Homer* v. *Shaw*, 177 Mass. 1. *Bowen* v. *Kimball*, 203 Mass. 364, 370, 371. *Barrie* v. *Quinby*, 206 Mass. 259, 267. But without any ostensible change the assignor remained in charge of the work until completion, and the plaintiff contends under the substituted declaration, that the

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money thereafter received should be considered as earned under the original contract. The assignor needed immediate financial assistance, and if the defendant might have advanced the money which the evidence shows he furnished to enable him to pay his employees, yet if he had done so the plaintiff's assignment would have been given priority over the loan. *Buttrick Lumber Co.* v. *Collins*, 202 Mass. 413. The parties while they could not modify to his prejudice the terms of the contract assigned without the plaintiff's consent, or by a secret fraudulent arrangement deprive him of the benefit of the assignment, were not precluded from entering into a new agreement if performance by the assignor had become impossible from unforseen circumstances. *Eaton* v. *Mellus*, 7 Gray, 566, 572. *Linnehan* v. *Matthews*, 149 Mass. 29. It consequently was a question of fact upon all the evidence for the presiding judge before whom the case was tried without a jury, to decide, whether upon facing the exigencies of changed conditions the parties mutually agreed to a cancellation, and thereupon in good faith an independent contract was substituted, by the terms of which the defendant undertook to furnish sufficient funds to pay the workmen the wages then due, and their future wages as they accrued, while the assignor was to receive a weekly salary for his personal services of supervision. The refusal to comply with the plaintiff's requests for findings, and the general finding for the defendant manifestly show his conclusion to have been, that the first contract was treated as having been rescinded, and the plaintiff had no enforceable claim against the defendant under the assignment. *Earnshaw* v. *Whittemore*, 194 Mass. 187, 192. *Glidden* v. *Massachusetts Hospital Life Ins. Co.* 187 Mass. 538, 541. The plaintiff's requests for rulings in so far as they were not given were rightly refused, and the exceptions must be overruled.

So ordered.

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GEORGE L. HUTCHINS *vs.* GEORGE NICKERSON, JR., & others, trustees.

Suffolk. March 15, 1912. — May 24, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Appeal, Bill. *Equity Jurisdiction*, Creditor's bill to reach and apply property fraudulently conveyed. *Res Judicata*. *Trustee Process*.

In a suit in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a judgment debt due to the plaintiff from the principal defendant property conveyed by him to and for the benefit of the other defendants fraudulently and with an intent on the part of all of the defendants to defeat, delay or defraud the creditors of the principal defendant, the bill was taken *pro confesso* as to the principal defendant, but no final decree was made as to him. All of the other defendants demurred, their demurrers were sustained, and final decrees were entered dismissing the bill as to them. The plaintiff appealed. No party objected to this court treating the case as properly before them, and it was *held*, that under the exceptional circumstances it would be so treated.

In a bill in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply, in payment of a judgment debt owed to the plaintiff by the principal defendant, an interest of the principal defendant under a will, trustees under which were among the defendants, it was averred in substance that the principal defendant had owned an interest worth $75,000 under the will in question; that the defendants other than the trustees conspired to sell that interest for their own benefit for much less than its value; that in pursuance of such conspiracy they procured a loan of $15,000 to be given to the principal defendant and two others of them from one of them for which the principal defendant gave a note for $20,000 secured by an assignment of the interest under the will; that then, by false representations that such note was due and that its holder might foreclose on his security, the principal defendant was induced to give to another of the defendants an option of purchase of the interest under the will for $45,000 and that a conveyance for $55,000 finally was made to still another of the defendants, $20,000 of that sum being used to pay the note already held by one of the defendants, and other sums being paid to the defendants other than the principal defendant either without consideration or largely in excess of any just claim, the principal defendant receiving only $4,000. Pending the transactions the principal defendant was persuaded by certain of the defendants to secrete himself from his creditors in a house where one of the defendants lived. The bill contained allegations of intent to defeat, delay or defraud the creditors of the principal defendant and of guilty knowledge and participation on the part of all the defendants except the trustees. The defendants demurred. *Held*, that the demurrers should be overruled because the bill stated a case for relief under R. L. c. 159, § 3, cl. 8.

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A bill in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a judgment debt due to the plaintiff from the principal defendant property conveyed by him to and for the benefit of the other defendants fraudulently and with an intent through a conspiracy on the part of all of the defendants to defeat, delay and defraud the creditors of the principal defendant, does not become multifarious merely because it follows all the ramifications of the conspiracy and thereby includes persons of varying degrees of culpability against whom the issues are not identical and against whom different kinds of relief may be necessary.

In an action of contract upon a promissory note trustees under a will under whose provisions the defendant was a beneficiary were summoned by trustee process and made answer that the defendant had assigned his interest, and the assignee thereupon was made a party to the action under R. L. c. 189, § 32, as a claimant. Issues were framed for a trial by jury, some of which involved an inquiry, whether the assignment had been procured by fraud, misrepresentation or collusion between the defendant and the claimant. An entry then was made by agreement, "Trustees discharged upon their answer." The plaintiff thereafter procured a judgment against the defendant and brought a suit in equity under R. L. c. 159, § 3, cl. 8, against him and others, including the claimant, to reach and apply in payment of the judgment debt the interest conveyed to the claimant, alleging that the conveyance was made by means of a conspiracy by all the defendants with intent to defeat, delay or defraud the judgment creditors. The claimant filed a plea setting up the judgment discharging the trustee in the action at law. *Held*, that the judgment in the action at law was not upon the merits and did not involve the same issues that were involved in the suit in equity, and therefore that it could not be relied on to sustain a plea of *res judicata* in that suit.

BILL IN EQUITY filed in the Superior Court on June 27, 1911, under R. L. c. 159, § 3, cl. 8, as stated in the opinion.

A plea of the defendant Glines and demurrers of the other defendants, described in the opinion, were sustained by *Hardy*, J., and decrees were entered dismissing the bill as to all the defendants except Nickerson, as to whom an interlocutory decree was entered that the bill be taken *pro confesso*. The plaintiff appealed from the decrees dismissing the bill as to the defendants other than Nickerson.

S. Bates, for the plaintiff.

E. A. Whitman, (*J. T. Pugh* with him,) for the defendant Glines.

J. F. Bassity, pro se, and for the defendant Fotch.

L. G. Blair, pro se, and for the defendants Hayes and Gale.

RUGG, C. J. 1. This is a suit in equity. In the Superior Court the only decree entered against Nickerson, the principal defendant, was that the bill be taken for confessed. This was not a final decree. *Russell* v. *Lathrop*, 122 Mass. 300. *Blanchard* v. *Cooke*,

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144 Mass. 207, 219. *White* v. *White*, 169 Mass. 52. *Goff* v. *Hathaway*, 180 Mass. 497. *Frow* v. *De la Vega*, 15 Wall. 552. *Thomson* v. *Wooster*, 114 U. S. 104. Suits in equity are not properly before this court as of right upon any appeal except from a final decree. R. L. c. 159, § 19, as amended by St. 1911, c. 284, § 1. *Fuller* v. *Chapin*, 165 Mass. 1. *Fitzgerald* v. *Fitzgerald*, 165 Mass. 471. Interlocutory matters cannot be brought here except upon report. R. L. c. 159, § 27. In the Superior Court decrees were entered dismissing the bill as to each of the other defendants. These were final decrees as to those parties, and from these decrees the plaintiff appealed. The gist of this suit is against these defendants. It is not certain that a court of equity would retain a bill like the present against the principal defendant, where the plaintiff is suing on a judgment, after it has been dismissed as to all the other parties against whom alone equitable remedies are invoked. At all events, it would not be obliged to do so when the only relief which can be afforded is strictly legal and not equitable in nature. *Newburyport Institution for Savings* v. *Puffer*, 201 Mass. 41, 47. We are inclined to think that the decrees appealed from are final in the sense that the real merits of the case are determined by them, and nothing of substance is left open in equity. Under these exceptional circumstances, when no party has raised the point and the issues have been argued fully, we treat the case as properly before the court. See *Forbes* v. *Tuckerman*, 115 Mass. 115; *Cheney* v. *Gleason*, 125 Mass. 166, 180; *Lowd* v. *Brigham*, 154 Mass. 107; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *Lewisburg Bank* v. *Sheffey*, 140 U. S. 445; *First National Bank* v. *Shedd*, 121 U. S. 74, 87; *Winters* v. *United States*, 207 U. S. 564, 575.

2. The bill is to reach and apply in payment of a debt due the plaintiff certain property conveyed by the defendant Nickerson, fraudulently and with intent to defeat, delay or defraud his creditors. R. L. c. 159, § 3, cl. 8. The substantial allegations are that Nickerson was a residuary legatee under the will of Caleb Chase, of which the defendants, Sias, Palmer and Rich, are trustees, and that the value of his interest was upwards of $75,000. No further allegations are made against the trustees. But it is averred that the other defendants with Nickerson conspired together to sell the latter's residuary interest for less than its real value for their own benefit and with intent to defraud, hinder or delay the cred-

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itors of Nickerson, in pursuance whereof, first, a loan of $15,000 was procured of Fotch and received by Nickerson, Bassity and Hayes, for which Nickerson's note for $20,000 due in April, 1910, with interest at one and one half per cent per month was given, secured by an assignment of his interest under the Chase will; next by reason of false representations that the Fotch note was due and that he would take over the interest under the Chase will, Nickerson was induced in October, 1909, to give to Gale an exclusive option on the residuary interest for $55,000, which subsequently changed to $45,000, and that through the efforts of others of the defendants Glines was induced to take an assignment of the Nickerson interest, paying therefor $55,000. Out of this sum $20,000 was paid in settlement of the Fotch note, several months before its maturity. Two thousand dollars was repaid to Glines, and other sums paid to others of the defendants either without consideration or largely in excess of any just claim, and that $4,000 only was paid to Nickerson. Pending these transactions, most of which occurred in November and December, 1909, Nickerson was persuaded by certain of the defendants to secrete himself in the house where one of the defendants lived, so that none of his creditors might prevent the sale. The defendants knew that the sale was fraudulent and unconscionable. For the purposes of this opinion the allegations of fact in the bill must be taken as true as all the defendants except Nickerson have demurred, and the bill has been taken *pro confesso* against him.

The bill sufficiently avers large overdue indebtedness by Nickerson and a conveyance by him of his property upon an inadequate consideration and the distribution of large sums of money out of this inadequate sale among some of the defendants without account to Nickerson and either without any indebtedness or an indebtedness grossly insufficient to justify the payments. A specific intent to defraud, hinder and delay the creditors of Nickerson and knowledge of the damaging facts on the part of those against whom relief is sought are averred as tainting every part of all the transactions. Most if not all of the defendants are alleged to have benefited pecuniarily by a voluntary transfer of property of Nickerson, conveyed so as to put it out of reach of his creditors. These results ensued from the execution of a design in which all participated with the purpose of profiting out of property which

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ought in good conscience to have gone to the payment of the debts of Nickerson, who during the execution of the plan was secreted from his creditors. This scheme stretches beyond the preference of one creditor to another, permitted at common law, and reaches to the kind of wrong for which the statute furnishes a remedy.

3. The bill is not multifarious. The scope of a bill to set aside a fraudulent conveyance does not become multifarious merely because it follows all the ramifications of the vicious project, and thereby includes divers persons of varying degrees of culpability against whom the issues may not be identical, and towards whom different kinds or degrees of relief may be necessary. If the scheme is comprehensive, the pleadings must be likewise extensive. "The unity of the plan embraces all the parts." *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

4. It is strongly argued in behalf of the defendant Glines that there is not enough set out in the bill to found a prayer for relief in chancery against him, and that the sum of all the charges against him amounts to nothing more than that he paid $55,000 for a valid assignment of Nickerson's interest, and that if he made $2,000 as profit that is something which he was entitled to keep. The allegations of fraudulent intent, guilty knowledge and participation with the others, although not repeated as to each step in the execution of the conspiracy, pervade and dominate the entire bill and attach to the conduct of Glines as much as to that of the others. Although the amount alleged to have been received by him is not so great as by some of the others, that is not significant. It is participation in the illegal plot, and not in its proceeds, which is the essential feature. Moreover, it is alleged that he holds the assignment of an interest in property worth $75,000, for which he paid only $55,000. These facts when joined with the fraudulent purpose and guilty knowledge are enough as matter of pleading. It does not destroy the liability of Glines that facts are alleged tending to show that Nickerson was defrauded by some of the other defendants. It is not infrequently an incident of a scheme to defraud, hinder or delay the creditors of a debtor in which he joins with others, that he may be both an actor in the wrong and a victim of it. There is nothing in *Lewis* v. *Bannister*, 16 Gray, 500, especially relied upon by the defendants, contrary to this view.

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5. The prayer for an accounting * between several of the defendants is not made the ground for jurisdiction in chancery. Hence *Badger* v. *McNamara*, 123 Mass. 117, is not controlling. The account is asked for as an incident to the main relief sought, and is properly made a part of the bill.

6. The defendant Glines filed a plea in bar, the substance of which was that the plaintiff brought an action at law against the defendant Nickerson, in which the trustees under the Chase will were summoned as trustees, and in which Glines appeared as claimant. The trustees filed an answer in which they set up the assignment from Nickerson to Glines. Issues were framed for a trial by jury, some of which related to the point whether the assignment was procured through the fraud, misrepresentation or collusion of the claimant. Thereafter the entry was made by agreement, "Trustees discharged upon their answer." The plea in substance is *res judicata*. The defense of *res judicata* is available when a judgment on the merits has been entered in an earlier action involving the same issues between the same parties. *Newburyport Institution for Savings* v. *Puffer*, 201 Mass. 41, 46. It does not appear that the judgment in the case at bar was on the merits. It may have been entered on other grounds than the soundness of the claimant's assignment. It does not purport to establish its validity. *Peck Bros. & Co.* v. *Stratton*, 118 Mass. 406. Moreover, the issues presented by the present suit are different and broader in their nature than those in the trustee action. This is not a bill in the nature of an equitable trustee process to reach and apply the propperty of the defendant Nickerson which cannot be attached or taken on execution under cl. 7 of R. L. c. 159, § 3. But, as has been pointed out, it is a bill to set aside a conveyance made in fraud of creditors under cl. 8 of the same section. The plea of Glines ought not to have been sustained.

Decrees dismissing the bill reversed.

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* This prayer was as follows: "Third. That the court appoint a receiver to collect and receive such amounts as this honorable court may find to be due from the several defendants by reason of money had and received by them on account of the sale heretofore mentioned, and such moneys as may be found to be due from the defendant trustees and that the defendants further be compelled to account for all moneys received by them as stated in paragraph five of the plaintiff's bill."

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LEVI A. DAME *vs.* C. H. HANSON & Co., Incorporated.

Suffolk. March 18, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Sale, Conditional.

By a contract of conditional sale the buyer of certain horses agreed "that if said goods and chattels . . . shall be attached or if I shall sell, mortgage, pledge or attempt to sell, mortgage or pledge the same . . ., or shall fail to pay said note at maturity, said [seller] shall have the right without any demand or notice to take immediate possession of said property and hold the same absolutely free from all claims and demands from me." *It was said*, that by the terms of this condition the title to the property would seem to have passed to the buyer subject to be divested at the option of the seller upon the happening of any of the contingencies named and the taking possession of the property by the seller pursuant to the condition.

One, who is in possession of a chattel under a contract of conditional sale by which the title is to pass to him upon the performance of the conditions of the contract, after he has made a part payment and when he has committed no breach has an interest in the chattel which he can convey by a mortgage, properly recorded, so as to give the mortgagee the right to enforce the contract against the seller, and, if later the buyer is in default, such mortgagee by tendering to the seller the amount due on the conditional contract before the seller has taken possession of the chattel acquires the title to the chattel as against the seller.

BILL IN EQUITY, filed in the Superior Court on March 15, 1911, to redeem certain horses sold by the defendant to one Terrell under contracts in writing called "leases" and mortgaged by Terrell to the plaintiff.

The case was heard by *Hitchcock*, J., who made a memorandum of findings by which the following facts appeared:

On September 29, 1910, and on November 19, 1910, Terrell went to the stable of the defendant in Lowell and purchased the horses in question for about $1,200. The horses were sold to Terrell "upon conditional sales or leases." These "leases" signed by Terrell contained the clause which is quoted in the opinion.

Terrell paid on account of the "leases" something over $500. On January 18, 1911, when no payments were due on the "leases," Terrell made a mortgage of the property to the plaintiff to secure his note for $756, giving the plaintiff a power of attorney to

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pay off any incumbrances against the property. This mortgage was recorded.

On February 18, 1911, Terrell sold the horses to one Coolidge for $1,050 and delivered to him a receipted bill thereof, which was put in evidence. Later the plaintiff looked for Terrell to get something paid on his mortgage and found that the horses were in the possession of Coolidge. On March 10, 1911, the plaintiff assigned the mortgage to Coolidge and indorsed the notes to him without recourse. On the same day Coolidge accompanied by an attorney, went to Lowell and saw C. H. Hanson, the manager of the defendant corporation, and talked the matter over with him. Hanson told them that there was then due him upon the property $695.75, and they thereupon offered to pay Hanson that amount, which he refused to receive. On March 11, the assignment of the mortgage and the indorsement of the notes to Coolidge were cancelled. On March 13, the defendant took the horses, claiming the right to do so because of the acts of Terrell in mortgaging and selling the property. On the next day, March 14, the plaintiff with his attorney went to Lowell and tendered to Hanson the sum of $700 in bills in payment of any amounts due upon the "leases." Hanson refused to receive it. The horses had ever since been in the possession of the defendant.

The defendant asked the judge on the evidence to find for the defendant. He asked him to rule, that no title to the horses passed to the plaintiff at the time of the mortgage by Terrell, and that the title to the horses did not pass to the plaintiff at the time of the tender of $700 by the plaintiff to the defendant.

The judge refused to find for the defendant or to make either of these rulings. He found that the plaintiff, upon payment by him to the defendant of the amount due to the defendant on the "leases" given by Terrell, was entitled to the possession of the horses. By order of the judge a final decree was entered, ordering the defendant, upon payment to him by the plaintiff of $695.75 to deliver the horses to the plaintiff. The defendant appealed.

The case was submitted on briefs.

J. J. Hogan & W. A. Hogan, for the defendant.

F. Keezer & E. M. Shanley, for the plaintiff.

MORTON, J. The property in question was sold by the defendant to one Terrell, upon what are termed "conditional sales or leases."

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The condition was as follows: "Signed by me [Terrell] and payable to C. H. Hanson & Co., Inc., or order that if said goods and chattels or any part thereof shall be attached or if I shall sell, mortgage, pledge or attempt to sell, mortgage or pledge the same or any part thereof, or shall fail to pay said note at maturity, said C. H. Hanson & Co., Inc., shall have the right without any demand or notice to take immediate possession of said property and hold the same absolutely free from all claims and demands from me." Taking the condition as it reads, the title to the property would seem to have passed to Terrell subject to be divested at the option of the defendant upon the happening of either of the contingencies named and the taking possession of the property by the defendant pursuant to the condition.

But however that may be, and assuming that the title was in the defendant, it was held by it subject to the performance by Terrell of the conditions named, and Terrell had therefore a right or interest which he could and did convey in mortgage to the plaintiff. *Chase* v. *Ingalls*, 122 Mass. 381. *Currier* v. *Knapp*, 117 Mass. 324. *Swallow* v. *Emery*, 111 Mass. 355. *Day* v. *Bassett*, 102 Mass. 445. Upon tender of the amount due by Terrell or his assignee before possession was taken by the defendant, the title vested in Terrell or his assignee. *Bailey* v. *Colby*, 34 N. H. 29, 37. *Cutting* v. *Whittemore*, 72 N. H. 107, 111. The case differs from those cases relied on by the defendant where no right or interest whatever passed until the goods were paid for by the purchaser according to the contract. In *Cottrell & Sons Co.* v. *Carter, Rice, & Co.* 173 Mass. 155, possession was taken several months before a tender was made. In the present case possession was not taken till after the tender when the rights of the plaintiff to redeem had become fixed. It is not necessary to consider the scope or effect of R. L. c. 198, § 11.

Decree affirmed.

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CITY OF BOSTON *vs.* CITY OF CHELSEA & others.

Suffolk. March 18, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Constitutional Law, Separation of powers. *Suffolk County.*

Res. 1910, c. 109, as amended by St. 1911, c. 482, requiring the Supreme Judicial Court upon application of any of the municipalities of Boston, Chelsea, Revere or Winthrop to appoint commissioners, who after application and hearing shall consider and report upon "an adjustment and apportionment, if any, of the expenses of the county of Suffolk and the proportion thereof, if any, that should fairly be borne" by the municipalities of Chelsea, Revere and Winthrop, and providing that the decree of the court confirming the decision of the commissioners shall be final and binding, is unconstitutional as an attempt to transfer to the judicial department a legislative power, in authorizing the court by a decree of confirmation to establish a rule of taxation by which some of the general burdens of government would be supported and also to repeal the existing provisions of law found in R. L. c. 20, § 7, and St. 1909, c. 490, Part I, § 52, which require the city of Boston to pay all charges of the county of Suffolk and exempt Chelsea, Revere and Winthrop from taxation for county purposes.

PETITION, filed in the Supreme Judicial Court on November 16, 1911, by the city of Boston under Res. 1910, c. 109, as amended by St. 1911, c. 482, asking for the appointment of a commission to consider and report what proportion of the expenses of the county of Suffolk, if any, should be borne by the city of Chelsea and the towns of Revere and Winthrop. The respondents the city of Chelsea and the town of Revere demurred and the respondent the town of Winthrop filed an answer containing a demurrer, all of them alleging that the resolve and statute were unconstitutional. The case came on to be heard by *Braley*, J., who, deeming that the question raised was of such importance that it should be decided finally before any further steps were taken, reported the case for determination by the full court. If the demurrers and so much of the answer as was by way of demurrer were overruled, commissioners were to be appointed; if the demurrers were sustained, the petition was to be dismissed.

J. J. Corbett, for the petitioner.

S. R. Cutler, (*H. W. James* with him,) for the city of Chelsea and the town of Revere.

H. W. Orcutt, for the town of Winthrop.

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RUGG, C. J. Article 30 of the Declaration of Rights of our Constitution provides that "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." It has been decided many times that the Legislature cannot delegate the power to make laws conferred upon it by a constitution sharply separating the three departments of government. *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474, 481. *Commonwealth* v. *Maletsky*, 203 Mass. 241, 247. *Bradbine* v. *Revere*, 182 Mass. 598, 600. *Opinion of the Justices*, 160 Mass. 586. *Stone* v. *Charlestown*, 114 Mass. 214, 220. When the attempt is to confer the power to make laws upon one of the other two departments of government, there is encountered the double prohibition of the Constitution against delegation of the law-making powers by the legislative, and against the exercise of that power by the co-ordinate department. It applies as strongly to the one as to the other. It is operative in equal degree upon the judicial and upon the other two departments of government. *Case of Supervisors of Election*, 114 Mass. 247. The question is whether Resolves of 1910, c. 109, as amended by c. 482 of the Acts of 1911, violates this article of the Constitution by imposing a law-making power upon the judicial department.

In substance, the act requires the Supreme Judicial Court upon application either by Boston, Chelsea, Revere or Winthrop (which municipalities constitute the county of Suffolk) to appoint commissioners, who after hearing shall "consider and report upon such an adjustment and apportionment, if any, of the expenses of the county of Suffolk and the proportion thereof, if any, that should fairly be borne by said municipalities of Chelsea, Revere and Winthrop, as they may deem to be just and practicable. . . . Said commission . . . shall return their decision to the Supreme Judicial Court at such time as the court may order, and the decree of said court confirming the decision shall be final and binding." R. L. c. 20, § 7, provides that the city of Boston shall furnish all necessary public buildings and pay all charges of the county of Suffolk with comparatively insignificant exceptions, while

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St. 1909, c. 490, Part I, § 52, expressly exempts the other municipalities of that county from all county taxes. Counties in Massachusetts are territorial subdivisions of the State bounded and organized by the Legislature for political purposes and the administration of government. They may be changed at the will of the Legislature, and the character and extent of the sovereign powers to be exercised through them are subject to modification in like manner, according to legislative judgment of the requirement of the interests of the public. *Opinion of the Justices*, 6 Cush. 578. Manifestly the determination of the functions of counties and the distribution of governmental authority among them is purely legislative in its nature. It partakes in no respect of the characteristics of judicial proceedings or determinations. The administration of county affairs and the division of county expenses in every revision of the body of our statutes has been the subject of one or more chapters. The payment of the expenses of the county of Suffolk by the city of Boston has been required by legislative provision since St. 1821, c. 109.

Analysis of the terms of the statute now under consideration shows that it contains no decision by the Legislature touching the division of expenses of Suffolk County among its constituent cities and towns, and that it does not disclose a determination to change the existing law upon the subject. It requires an examination into the matter by a commission appointed by the Supreme Judicial Court. The only rule prescribed for their guidance is that they shall report such apportionment of the county expenses, if any, as they think should fairly be borne by the other municipalities as matter of justice and feasibility. The fullest discretion is vested in the commission to report in favor of a continuance of the present plan or any modification of it, which in view of practical and equitable considerations in fairness seems to them wise. The commission is not required to report to the Legislature in order that it may act in the light of the recommendations and reasoning resulting from their investigation and deliberations. But the "decision" is to be made to the court, and to become operative by virtue of its decree of confirmation. The result of such a decree would be legislative in two respects. It would establish a rule of taxation by which some of the general burdens of government would be supported. It would also effect the repeal of the existing

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provisions of general law found in R. L. c. 20, § 7, and St. 1909. c. 490, Part I, § 52, without any act of the General Court. This is a delegation of a legislative function. If assumed by the court, it would be an exercise by the judicial department of legislative powers.

It is urged in behalf of the petitioner that the requirement of the statute is in substance and effect the same as that contained in several acts providing for the apportionment of the expenses of improvements for metropolitan sewerage and park districts, the constitutionality of which was upheld in *Kingman, petitioner*, 153 Mass. 566. The difference, however, between the principles upon which that case was decided and the present, although narrow, is clear.

The Legislature was dealing in the statute then under consideration with a specific public improvement, the expense of which was to be borne by cities and towns designated in the statute itself. The district and the benefit accruing from the improvement was declared by the Legislature. Only the apportionment of the expense in a just manner was left to the court and the commission appointed by it. The present statute does not relate to a particular improvement, but to the ordinary expenses of a subdivision of the government. The ascertainment of the cities and towns deriving special and peculiar benefits from a designated public improvement has been left by the Legislature to the determination of commissioners appointed by this court or by the Governor and Council in numerous instances. *Salem Turnpike & Chelsea Bridge Co.* v. *County of Essex*, 100 Mass. 282. *Northampton Bridge case*, 116 Mass. 442. *Brayton* v. *Fall River*, 124 Mass. 95. *Agawam* v. *Hampden*, 130 Mass. 528. *County Commissioners, petitioners*, 140 Mass. 181. *In re Metropolitan Park Commissioners, petitioners*, 209 Mass. 381. *De las Casas, petitioner*, 178 Mass. 213; *S. C.* 180 Mass. 471. *Dow* v. *Wakefield*, 103 Mass. 267. *Carter* v. *Cambridge & Brookline Bridge Proprietors*, 104 Mass. 236. *Scituate* v. *Weymouth*, 108 Mass. 128. Such an inquiry is quasi judicial in its nature, and may well be left to the decision of persons appointed by and reporting to the court in accordance with established judicial usages. It is different in kind from the determination of the municipalities which should bear the general burdens of public administration and the propor-

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tions in which they should contribute, which is a question rather of political or governmental expediency. Moreover, the effect of the report when confirmed by the court would be to repeal statutes now in force, which would of itself be a legislative rather than a judicial act. If the Legislature should name the cities and towns by which the expenses of Suffolk County should be borne, and provide for the apportionment between those designated according to principles of justice and fairness a different question would be presented, which need not be considered now.

The conclusion follows that the statute under which this petition is brought goes beyond the power of the legislative department of government in the delegation of a distinctly legislative function to the judicial department, and hence is unconstitutional.

Petition dismissed without costs.

JOHN J. COLLINS *vs.* BRIDGET COLLINS.

Middlesex. March 18, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Husband and Wife. Contract, Validity. *Equity Jurisdiction,* Specific performance.

A man and woman made an antenuptial contract by which after their marriage they were to retain their respective estates, with a provision that, if the wife should survive the husband she should receive within six months from the time of his death the sum of $1,000 from his estate, that to secure such payment she should have possession of certain real estate of which he was seised which should become hers absolutely if the payment was not made within six months, and that upon his death she should by deed release all interest in his estate excepting such claim of $1,000 and the security of the payment therefor. After their marriage and the death of the husband, his sole heir at law within six months tendered to the widow the sum of $1,000 and demanded a release of all her interest in the estate of her late husband. Upon her refusal the heir at law brought a bill for specific performance of this provision of the contract. *Held,* that the provision of the contract was valid and that the plaintiff was entitled to a decree.

BILL IN EQUITY, filed in the Superior Court on August 23, 1910, by the son and sole heir at law of John Collins, late of Malden, who died intestate on March 22, 1910, against the widow of

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John Collins to enforce the provisions of an agreement printed below.

The bill alleged that the maiden name of the defendant was Bridget Davis, that she was married to John Collins on February 22, 1900, and that, before such marriage, on February 14, 1900, John Collins and the defendant entered into the contract printed below, that John Collins at the time of his death was seised of the real estate referred to in the contract, that he had owned it since 1869 and that it was estimated to be worth about $4,000, that after the death of John Collins the plaintiff had tendered to the defendant the sum of $1,000 and demanded a release of the defendant's interest in the estate of John Collins in accordance with the terms of the contract, but that the defendant refused to release her interest in the estate. The plaintiff offered to pay the defendant $1,000 and to comply with all the terms of the contract and prayed for a decree for the specific performance of the contract.

The defendant demurred to the bill.

The contract sought to be enforced was as follows:

"This agreement made and entered into this fourteenth day of February, A. D. 1900, by and between John Collins and Bridget Davis both of Malden Commonwealth of Massachusetts Witnesseth: that in consideration of the promise and agreement of the said John Collins to marry the said Bridget Davis and of the said Bridget Davis to marry the said John Collins it is hereby mutually agreed that both the said parties shall retain their respective estates with such as may hereafter accrue to them, separate and apart from the other, subject to the payment of their respective debts, with power to each to manage and dispose of their estates as they shall see fit, and at their decease to have the same descend to their respective heirs at law or otherwise dispose of as they may respectively by last will and testament order and appoint. In case of the decease of the said John Collins she, the said Bridget surviving him there shall, within six months from the time of his decease be paid to the said Bridget the sum of one thousand dollars from his estate. In order to secure the payment of the said sum, she, the said Bridget, immediately upon the decease of the said John Collins shall have the sole use and possession of the premises numbered 29 Brackenbury Street, in Malden being

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the northerly portion with the buildings thereon of the premises conveyed to the said John Collins by Elijah B. Putnam and Susan E. Putnam. . . . If at the expiration of the six months, the said sum of one thousand dollars has not been paid to the said Bridget, then she shall have the said estate in fee with power to dispose of the same. Upon the death of the said John Collins, she the said Bridget surviving shall by deed release all interest in his estate excepting the said claim of one thousand dollars and the security of the payment thereof."

Here followed the attesting clause with the signatures of the parties, an acknowledgment by John Collins and a certificate of the recording of the contract.

The case first was heard upon the demurrer by *Richardson*, J. He made an order overruling the demurrer, and the defendant appealed. The defendant filed an answer and a final decree was entered by order of *Jenney*, J., overruling the demurrer, and ordering the defendant, upon tender to her of the sum of $1,000 by the plaintiff, to execute a release of all her interest in the real estate of her late husband, John Collins. The defendant appealed.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the defendant.

J. J. O'Connor, for the plaintiff.

DECOURCY, J. In her antenuptial contract with John Collins the defendant agreed, in the event of her surviving him, to release all interest in his estate except the claim for $1,000 and the security provided therefor. The bill of complaint alleges that the plaintiff, who is the sole heir of the deceased husband, has duly tendered this money and is ready and willing to pay it to the defendant, but that she refuses to release her interest in the estate. The contract is a lawful one and will be enforced in equity. *Paine* v. *Hollister*, 139 Mass. 144.

The provisions of R. L. c. 153, § 26, relied upon in the defendant's demurrer, apply only to antenuptial contracts enabling the respective parties to hold their separate property after marriage, and do not affect an antenuptial agreement relating only to the rights which a widow may claim in the estate of her deceased husband. So far as the bill discloses, the defendant had no separate property. Even assuming that the statute may apply to the agreement in question, it does not affect her obligation to release

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all interest in the estate of her late husband; and the demurrer was rightly overruled. *Jenkins* v. *Holt*, 109 Mass. 261. *Freeland* v. *Freeland*, 128 Mass. 509.

Decree affirmed with costs.

E. W. BURT AND COMPANY, Incorporated, *vs.* COES AND YOUNG COMPANY.

Suffolk. March 18, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Appeal.

On an appeal from a decree dismissing a bill in equity after overruling the plaintiff's exceptions to a master's report, the evidence on which the master's findings were based was not before this court and the only question was whether the decree lawfully could be entered upon the facts found and stated in the report of the master and the memorandum of the trial judge. It being manifest that such was the case, the decree was affirmed.

DECOURCY, J. This is a bill in equity brought to restrain the defendant from using the trade-name "Flexible Arch," and from advertising its shoes by means of a pictorial representation of a shoe bent at the arch thereof. The case was referred to a master and subsequently was heard on the plaintiff's exceptions to the master's report, by a single justice of this court.* The exceptions were overruled, the master's report confirmed, and a final decree was entered dismissing the bill.

The plaintiff's appeal from the decree does not bring the evidence before us, and we cannot consider the exceptions based on the contention that the master's findings are not warranted by the evidence. The only question before us is whether the decree lawfully could be entered upon the facts found and stated in the report of the master and the memorandum of the single justice; and manifestly it could. Without reciting the facts at length, it was found that the defendants acted in good faith in advertising their shoes as "Coes & Young's 7.00 Flexible Arch-Support Shoes,"

* *Morton, J.*

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and that the purchasing public were not likely to be, and in fact were not deceived into buying them for the plaintiff's "Flex-Arch" shoes. The plaintiff proved no exclusive right to make, advertise and sell shoes with a flexible shank or arch for the prevention and cure of flat foot, or to use pictorial illustrations of a shoe bent at the arch to show its flexibility; and no infringement of trade-mark rights or unfair competition was established.

Decree affirmed with costs.

E. N. Curtis, for the plaintiff.

G. H. Maxwell, for the defendant, was not called upon.

LAUREN F. LANGLEY *vs.* SARAH A. CONLAN & another.

Middlesex. March 19, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Power. Estoppel. Writ of Entry, Damages. *Land Court. Statute*, Construction, Repeal.

A testator devised certain real estate to a trustee to hold for the benefit of a daughter of the testator during her life, authorizing the trustee to sell the real estate for the benefit of the daughter and giving the daughter a power to dispose of it by will. No disposition was made of the real estate in case she failed to exercise the power. She was one of her father's two heirs at law. The trustee named in the will declined to serve. The daughter, to secure her note for money lent to her, made a mortgage of the real estate with full covenants of warranty, which was recorded. Shortly after this she acquired by deed the interest of the other heir at law and was appointed trustee under her father's will. Later she resigned as trustee and a successor was appointed in her stead, who conveyed the real estate to a certain person. The mortgagee then foreclosed his mortgage for breach of condition and recorded a certificate thereof. A year later the daughter died and left a will by which she devised the real estate to the grantee of the trustee. In a writ of entry by the mortgagee against such grantee and devisee, it was *held*, that the daughter was estopped by her covenants in the mortgage from exercising the power of disposing of the real estate by will as against the mortgagee. *Held, also*, that the deed of the trustee passed no title as against the mortgagee, because before that deed was given the trust had been extinguished by merger, the complete title to the real estate having vested in the daughter when she acquired the entire remainder in fee and was appointed trustee, and the tenant having taken his deed with notice by record of the mortgage and of the daughter's appointment as trustee.

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The provisions of R. L. c. 179, §§ 12, 13, 21, to the effect that when the demandant in a writ of entry recovers judgment he shall recover damages for rents and profits and any damages for waste to be determined by the jury at the same time unless a postponement of the assessment of such damages is allowed upon a motion made before the verdict on the title is recorded, still apply so far as possible to writs of entry since their transfer to the Land Court by St. 1904, c. 448, although there is no jury in that court, the rule being that such damages must be assessed at the time of the trial of the title unless a motion for the postponement is made before the finding of the Land Court is filed.

WRIT OF ENTRY, dated October 19, 1908, for a lot of land in Cambridge alleged by the demandant to belong to him in fee.

In the Land Court the case was tried before *Clark*, J. The facts which appeared in evidence and the proceedings in the Land Court are stated in the opinion. At the request of the parties the judge reported the case for determination by this court of the questions which are considered in the opinion.

The case was submitted on a brief by the demandant.

C. A. Whittemore & J. S. Patton, for the demandant.

RUGG, C. J. This is a writ of entry to recover land claimed in fee by the demandant. John O. Langley died leaving a will duly proved and allowed in 1872, by which he gave the demanded premises to a trustee to hold for the benefit of his daughter, Eliza J. Langley, for her life, authorizing the trustee in his discretion for the benefit of his daughter Eliza to sell the real estate, and empowering her to dispose of it by will. No disposition was made of it in case she failed to dispose of it by will. The only heirs at law of the testator were two daughters, Eliza and Mary. The trustee named in the will declined to accept, and the daughter Eliza was appointed administratrix with the will annexed in 1872, rendering her final account as such in 1874. By a mortgage deed containing full convenants dated December 7, 1900, and duly recorded, Eliza conveyed the premises in mortgage to the demandant to secure her note for $1,100. In November, 1901, Eliza acquired by deed whatever title had vested in her sister at the death of the testator, and was appointed and qualified as first trustee under his will. In 1902 she resigned, and one Barlow was appointed trustee in her stead, who as such trustee conveyed the demanded premises to the tenant Conlan in October, 1902. In November, 1902, the demandant made entry on the demanded premises to foreclose his mortgage for a breach of its condition,

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and duly recorded a certificate thereof. In 1903 Eliza J. Langley died, leaving a will dated September 25, 1902, which was duly allowed, and by which she devised the demanded premises to the tenants, Conlan and one McAleer whose administrator is joined in this writ.

The question is whether the demandant makes out a title on these facts. The first point to be considered is the execution of the power conferred upon Eliza J. Langley by the will of her father to dispose of the premises by will. It has been decided that a voluntary appointment made in execution of a general power is not good against creditors, and that by such appointment the property appointed becomes in equity a part of his assets. *Clapp* v. *Ingraham*, 126 Mass. 200. *Tuell* v. *Hurley*, 206 Mass. 65, 67. The question has never arisen in this Commonwealth whether the donee of a power can be estopped from a voluntary exercise of the power. But it seems to follow from the decisions just cited. It is only consonant with principles of fair dealing and common sense that any conduct by the donee of a power which in good faith precludes him from making an appointment should have the effect of an estoppel. Any dealing with the estate by the donee of the power inconsistent with its exercise by which the rights of others are affected puts an end to the power. It has been so held in other jurisdictions. *In re Hancock*, [1896] 2 Ch. 173. *Foakes* v. *Jackson*, [1900] 1 Ch. 807. *Leggett* v. *Doremus*, 10 C. E. Green, 122, 127. *Brown* v. *Renshaw*, 57 Md. 67, 79. *Grosvenor* v. *Bowen*, 15 R. I. 549. This principle prevails notwithstanding the general rule that appointees by exercise of a power take, not through the person making the appointment, but through the donor of the power. Where the execution of the power is voluntary on the part of the donee, his conduct may be such as to prevent the exercise of the power. This is such a case. Eliza J. Langley made conveyance in mortgage with full covenants of warranty to the demandant. She received for her own use the consideration of the mortgage. It is hard to conceive of conduct more decisively indicating in good faith a promise not to exercise the appointment to the prejudice of the mortgagee. It follows that the appointees under the will of Eliza J. Langley have no title in the demanded premises.

The will of John O. Langley created a life estate for the benefit

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of his daughter Eliza. As he made no disposition of the property in the event of her failure to exercise the power of appointment, he was intestate to that extent. Hence the remainder vested in his heirs at law subject to the daughter Eliza's life estate and subject to be divested by the exercise of the power of appointment by her. At the time of the conveyance by Eliza to the demandant, she was therefore life tenant and owner in fee of one half the remainder subject to her own power of appointment, and shortly after this mortgage she acquired the entire interest in remainder, and was appointed trustee under the will of her father, being the first to qualify as such trustee. The inquiry is whether the conveyance to the demandant passed title so as to render ineffective the deed of Barlow subsequently appointed trustee. Under these circumstances there was a merger of the life interest and the ownership of the remainder so as to vest an absolute title in Eliza. It is a general principle that where property is given for the benefit of certain persons in such a way that no one else has or can have a possible interest in it, they are in effect absolute owners and should have the control and disposition. In such a case equity will decree a dissolution of the trust. *Sears* v. *Choate*, 146 Mass. 395. It also is held generally that where the legal and equitable title of real estate both vest in the same person, the equitable title will merge in the legal estate, and absolute ownership will ensue divested of the trust. 1 Perry on Trusts, (6th ed.) 347, and cases there cited. The present case calls for the application of this principle, and it works an equitable result. Eliza J. Langley was the beneficiary for life and the owner of one half the remainder. At this time there was no trustee. She personally acquired the entire remainder in fee and was appointed trustee. If the conveyance and mortgage had been made at this time about a year after it was in fact made, beyond doubt it would have conveyed a perfect title. The demandant as mortgagee put his mortgage upon record, so that it was notice to all the world, and the appointment of Eliza J. Langley as trustee was also matter of public record. The mortgage was also notice that the power of appointment could not be exercised by Eliza at the expense of the mortgagee or any person claiming under it. With notice of all these facts, the tenants accepted their conveyance. The result is that the conveyance to them passed no title,

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and that the demandant by the mortgage and entry for possession under it has acquired title.

At the trial in the Land Court no evidence was introduced touching the demandant's damages, nor was any motion or order made postponing the assessment of damages for rents and profits or otherwise, until after the decision of the Land Court, when the demandant filed a motion that his damages for rents and profits and for waste be assessed by the court. This motion was denied, and the demandant excepted. Thereafter, but within the statutory time, the demandant claimed an appeal from the decision of the Land Court for a trial by jury in the Superior Court, and filed a motion to have issues relating to the assessment of his damages allowed as issues to be tried to a jury. This claim for appeal and motion were denied on the ground that no question of damages was raised in the decision sought to be appealed from. R. L. c. 179, §§ 12, 13, 21, in substance provide that if the demandant in a writ of entry recovers judgment, he shall in the same action recover damages for rents and profits, and that the jury shall assess such damages at the same time unless a postponement of the ascertainment of such damages is allowed on motion made before the verdict on the title. St. 1904, c. 448, transferred jurisdiction from the Superior Court to the Land Court of all writs of entry under R. L. c. 179. This means that no provisions of chapter 179 are repealed, but that they all shall be applicable to the proceedings in the court to which jurisdiction is transferred, so far as possible. It is true that a verdict in its strict sense can only be rendered by a jury, and the word does not include a finding by a court. *Bearce* v. *Bowker*, 115 Mass. 129. It does not follow, however, that because original and exclusive jurisdiction of writs of entry has been transferred to the Land Court, which has no jury, the provisions of §§ 12, 13 and 21 of R. L. c. 179, are of no effect in the Land Court. They govern its procedure with such changes as its inherent constitution makes necessary. The rule is, therefore, that damages for rents and profits and waste must be assessed at the same time that the trial of the title is had, unless motion is made for postponement of the assessment before the finding of the Land Court is filed. Moreover, apart from the statute, the general rule as to the trial of causes is that the parties must present all their evidence upon all issues pending, and cannot as of right have a

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trial divided. When the statute was enacted giving a demandant the right to recover rents and profits in the same action by which his title was tried, the former common law remedies were superseded, and the statutory remedy became exclusive. *Raymond* v. *Andrews*, 6 Cush. 285. Inasmuch as the demandant proffered no evidence respecting damages, and made no motion to have that portion of the issues heard at a later time, he could not ask as of right that his damages for rents and profits be assessed after the decision of the Land Court as to the title was filed. His exception in this regard must be overruled. *Judd* v. *Gibbs*, 8 Gray, 435. It follows from this that he had no right to claim an appeal from the Land Court for a trial by jury upon this issue in the Superior Court. He was not a party aggrieved by any decision rendered by the Land Court. Upon the only issue which he proffered there the finding of the Land Court was in his favor. Hence he was not entitled to appeal. St. 1904, c. 448, § 8. There is nothing in *Mead* v. *Cutler*, 194 Mass. 277, or *Weeks* v. *Brooks*, 205 Mass. 458, 463, inconsistent with this conclusion.

In accordance with the terms of the report, judgment is to be entered for the demandant, but without damages.

So ordered.

FREDERICK M. MORSE, administrator, *vs.* COMMERCIAL TRAVELLERS' EASTERN ACCIDENT ASSOCIATION.

Suffolk. March 19, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Insurance, Accident. *Negligence*, In use of canoe.

A fraternal beneficiary certificate providing an indemnity for death of the insured contained a condition that no indemnity should be paid for death resulting from "any injury caused wholly or in part, directly or indirectly, by . . . voluntary exposure to unnecessary danger; . . . nor for any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed." The certificate holder was drowned from the capsizing of a canoe in which with a companion he was paddling on Moosehead Lake in Maine. It appeared that in the morning of the day of the accident he with his companion

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had made a difficult trip to a point near a mountain, and during the trip had passed through waters as rough as any on the lake, that there was a strong wind blowing from the mountain over the lake in such a way that from the shore the water did not look excessively rough, but that a mile and a half from the shore it became dangerous, that before the certificate holder and his companion started on their afternoon trip they were warned by several experienced guides that the lake was so dangerous that no canoes were on it, and that, without further inquiry they embarked and about a mile and a half from the shore were drowned. *Held*, that the catastrophe was not one resulting from over confidence for which there were reasonable grounds or from an error of judgment in regard to a matter concerning which prudent men might differ, but that it involved a lack of ordinary care and a hazardous exposure to risk of such a nature that there could be no recovery on the certificate.

MORTON, J. This is a bill in equity by the administrator of the estate of Frank F. Morse to compel the assessment by the defendant on its members surviving at the death of the intestate of the sum of $2 each, and from the sum so realized to compel the payment to the plaintiff, for the benefit of Elizabeth G. Morse, the beneficiary named in the certificate of membership in the defendant association which the deceased held at the time of his death, of the amount realized therefrom not exceeding $5,000. There was a decree * dismissing the bill and the plaintiff appealed.

The deceased came to his death by accidental drowning on Moosehead Lake, on September 20, 1898. The certificate provided amongst other things that "no indemnity shall be paid to any member . . . for any injury caused wholly or in part, directly or indirectly, by . . . voluntary exposure to unnecessary danger; . . . nor for any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed. Nor shall any indemnity be paid to the beneficiary of any member for the death of said member resulting from an injury caused wholly or in part, directly or indirectly, by either of the foregoing causes."

The intestate and a companion had been in the Moosehead Lake region on a canoe trip for a vacation. On the morning of the day of the accident they were at a place called Socatean Point, about ten miles northwest of Mount Kineo, and paddled from there to Point Kineo, arriving about noon. There was a strong northwest wind, and the master found that over a part of the course,

* By *Pierce*, J.

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going one way, the water was as rough and dangerous as it was in any other part of the lake. There was another course which was much less dangerous. It did not appear which course the intestate and his companion took. But as already stated, they arrived at Point Kineo safely about noon. They took in a pailful of water on the trip. They stayed at the hotel about two hours and later returned to the canoe and started to paddle to Moody Island, about two miles down the lake in a southeasterly direction from the hotel. Between the time that they arrived at Point Kineo and the time when they started for Moody Island they were spoken to by several guides and cautioned about going out, and were told that it would be dangerous and that no canoes were out on the lake because the guides thought it dangerous. In spite of the warning thus given and of the condition of the weather, they started out. They were watched for about a mile and a half, the canoe and its occupants occasionally disappearing in the trough of the waves, when a flash was seen, after which the canoe disappeared and was not seen again. There is no finding to that effect by the master*, but it is probable that the flash referred to was caused by the wet bottom of the canoe as it capsized. The canoe was found on the shore of the island and the bodies were recovered about ten days later. The day was one of the worst of the season, the wind blowing from the northwest and gradually increasing in force till about four o'clock. When a northwest wind strikes the mountain it is divided and a part deflected to one side and a part to the other side. These currents and the wind from over the top of the mountain unite from a half a mile to a mile from the shore, leaving the water protected for that distance and causing a very rough, choppy sea where they unite. One standing on the shore would not realize this nor be able to determine just how rough the water was where the winds came together. A short distance from Moody Island there was a submerged ledge, but the master finds that this had nothing to do with the accident and did not cause the drowning of Morse and his companion. The master finds that Morse and his companion did not know of this ledge and made no inquiries about the conditions which they would have to encounter, and not only failed to seek advice but refused such advice as was given; that the general

* Thomas L. Wiles, Esquire.

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condition of the wind and water should have been a warning to them; that having made a ten mile trip in the morning they must have known that the trip would be a hard one, and that the fact that there were no guides out on the lake in canoes should also have been a warning to them. He concludes his report as follows: "Upon all the evidence it appears and I find as a fact that the deceased, Frank F. Morse, did not comply with the terms and conditions of his policy. That his death resulted from an act that he by the exercise of ordinary care, prudence and foresight might have averted or prevented. Further that his own negligence contributed to his death. Further that the injury which caused the death was wholly or in part directly or indirectly due to this voluntary exposure to unnecessary danger. That he did not use ordinary care, prudence and foresight and that his own negligence contributed to his death. I find that the notice of death was good and complied with the requirements of the by-laws and conditions of policy. Upon all the evidence it appears and I find as a fact that the death of Frank F. Morse was not accidental under the terms of the policy issued to him and that there can be no recovery under said policy."

It is hard to criticize the conduct of those who have paid for their imprudence, as these young men did, with their lives. But upon the facts found by the master it is plain, we think, that there can be no recovery under the policy, and that the decree dismissing the bill was right and must be affirmed.

The deceased and his companion were warned of the danger by those whose experience and occupations should have caused their opinion concerning the conditions which existed in regard to wind and weather to be listened to and heeded. They knew that there were no canoes out on the lake because it was considered too dangerous for canoes to be out. They made no inquiries of any one as to the conditions which they would meet. Apparently they relied on the fact that they had made the trip safely in the morning, and on the appearance of the lake as far as they could see it from the shore. But to start out as the deceased did could be found to be, as the master has found that it was, a lack of ordinary care and prudence on his part and a voluntary exposure to unnecessary danger which contributed to and caused his death; and which, therefore, according to the express terms of the certificate, pre-

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vents any recovery. The case is not one of a catastrophe resulting from an over-confidence for which there were reasonable grounds, or from an error of judgment in regard to a matter concerning which prudent men might differ, but it involved a disregard of warnings which under the circumstances the master was warranted in finding the insured was bound in the exercise of due care to heed, and a hazardous exposure to the conditions of wind and weather which ordinary prudence and foresight forbade. See *Tuttle* v. *Travellers' Ins. Co.* 134 Mass. 175; *Smith* v. *Ætna Life Ins. Co.* 185 Mass. 74; *Garcelon* v. *Commercial Travellers' Eastern Accident Association*, 195 Mass. 531.

The result is that the decree must be affirmed.

So ordered.

J. W. Morton, for the plaintiff.

W. F. Merritt & N. T. Merritt, Jr., for the defendant, submitted a brief.

NATHANIEL LIPSOHN *vs.* SAMUEL L. GOLDSTEIN & another.

Suffolk. March 19, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Mortgage, Of personal property: foreclosure.

A master, to whom was referred a suit in equity to enjoin the removal of household furniture which the plaintiff had mortgaged to secure a loan of $205 and which six months afterwards had been sold at foreclosure sale for $65, found that ample notice of the sale was given and that, although the notice did not state the terms of the sale and they were not announced until the sale was opened, nothing was done to hinder the plaintiff from having a fair opportunity to get money to pay off the mortgage or bid at the sale, and that there was no bad faith or unreasonableness in making the terms cash. He also reported that there was no evidence submitted by either party as to the value of the furniture at the time of the sale, and that he could not "find that the price at which the chattels were struck off was low in proportion to their real value." *Held*, that the bill should be dismissed.

BILL IN EQUITY, filed in the Superior Court on June 16, 1908, and afterwards amended, alleging that the plaintiff's household furniture had been sold to the defendant Masofsky illegally at a sale in

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foreclosure of a mortgage, and seeking to enjoin the defendants from taking measures to remove it. In the amendment there was an allegation of readiness to pay what was due upon the mortgage.

In the Superior Court the suit was referred to Francis M. Carroll, Esquire, as master. Among facts found in his report and in a supplemental report were the following:

On December 7, 1907, the plaintiff, to secure a note for $205, gave to one Ready a mortgage "covering certain household furniture enumerated therein and which was examined by Ready before the loan was made." The mortgage provided that the amount borrowed was to be repaid in six equal monthly payments with interest at the rate of $6.15 per month. On April 8, 1908, there was due to Ready $72.10. On May 22, 1908, Ready assigned the mortgage to the defendant Goldstein, who immediately took steps to foreclose it by advertisement and sale, the sale to take place at eleven o'clock in the forenoon of June 15. The plaintiff received notice of the sale on June 8. The notice contained no statement of the terms, whether cash or otherwise, under which the sale would be conducted. At about ten o'clock in the forenoon of the day of the sale, the defendants Goldstein and Masofsky and an auctioneer went to the plaintiff's residence for the purposes of a sale. The plaintiff refused them admittance. There were some negotiations as to settlement of the amount due on the mortgage. There was talk about the plaintiff giving a note for the amount due, the note to be signed by the plaintiff and his wife and indorsed by his father-in-law, who was financially responsible. Goldstein was willing to accept this, but the plaintiff would not agree to the proposal. The bargaining continued until nearly eleven o'clock without resulting in any agreement. Between 10.45 and eleven o'clock, the wife of the plaintiff asked to be allowed to go for money to her mother who lived at a walking distance of four or five minutes. Goldstein stated to her that the sale would have to be started before eleven o'clock or the proceedings abandoned and that he would not wait for her. The auctioneer then announced that the sale must begin if it was to be conducted at that time and at about three minutes before eleven he put up his flag. When the sale was started, the first bid was by the defendant Masofsky at $60, the second by the plaintiff at $61, and the third by the plaintiff's sister-in-law at $62. The property was finally

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struck off for $65 to the defendant Masofsky, who was there as a friend of the defendant Goldstein and to whom Goldstein furnished the necessary cash.

The master further found as follows: "I find as a fact that the plaintiff had known for several days that the sale was to take place at eleven o'clock on the morning of June 15, 1908, that a paper containing the notice of foreclosure was mailed to and received by him, and that the plaintiff's wife had had time to go to her mother for money between ten o'clock and the time when the sale actually began had she so desired. Mrs. Lipsohn [the plaintiff's wife] testified she knew the sale was to take place at least one day before said June 15. I find as a fact that Goldstein did nothing to hinder or prevent the plaintiff from having a fair opportunity to get the money to pay off the mortgage or bid at the sale."

"From the talk he had been having with the plaintiff, the defendant Goldstein must be held to have known that the plaintiff did not have sufficient money at that time to pay cash for the goods if struck off to Lipsohn. But in view of the fact that care had been taken to notify the plaintiff that the sale was to take place and that the plaintiff knew of the sale in season to supply himself with cash to pay the balance due if he was able to do so, and from the further fact that the plaintiff had rejected the overtures to make a settlement by giving a note, I find that under all the circumstances there was no bad faith or unreasonableness in making the terms cash."

"There was no evidence submitted by either party at any of the hearings as to the value of the chattels in question. These chattels were enumerated in the mortgage given by the plaintiff and consisted of various articles of household furniture. On the day of the foreclosure, the plaintiff refused the auctioneer admission to his house, and the sale was finally made without the purchaser, or any of the other parties who came or were there with him, having seen the chattels. In conducting the sale, the auctioneer first read the list of articles enumerated in the mortgage, and called for bids on the several articles separately. No bids were made on the individual pieces as offered and they were then offered for sale as a whole. On the evidence, I cannot find that the price at which the chattels were struck off was low in proportion to their real value."

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Exceptions by the plaintiff to the master's reports were overruled and the reports were confirmed by *Jenney*, J., and a final decree was entered dismissing the bill. The plaintiff appealed.

J. H. Duffy, for the plaintiff.

M. F. Cunningham, for the defendants.

BRALEY, J. The defendant Goldstein, when as mortgagee he attempted to execute the power of sale upon default of the plaintiff, was bound to act in good faith, and to use every reasonable means to obtain the full value of the mortgaged personal property, and to protect the interests of the plaintiff who was mortgagor. *Montague* v. *Dawes*, 14 Allen, 369. *Clark* v. *Simmons*, 150 Mass. 357. The master was not directed to report the evidence, and, his findings of fact being final, it appears from the first report, and the supplemental report, which are to be read together, that the sale was advertised in a local newspaper published in the place of the plaintiff's residence, who received notice of the time and place, and if the record is silent as to the terms of the power of sale, no question is raised that they were not followed. The plaintiff did not request an adjournment of the sale although there were few bidders, and the master finds, that the price obtained was not disproportionate to the real value of the property. It is conceded that the notice contained no reference to the terms of payment, and the plaintiff, who up to the last moment endeavored to raise enough money to prevent the sale of his household goods, was unable to obtain the money. The power of sale, however, must be assumed to have been in the ordinary form, and the mortgagee could have sold, and arranged with the purchaser to give credit for the purchase money, and if the property had brought more than the sum secured by the mortgage he would have been answerable to the plaintiff for the surplus. *Bailey* v. *Aetna Ins. Co.* 10 Allen, 286. The plaintiff's financial inability undoubtedly influenced the terms of sale, but if so, the master reports, that under the circumstances the requirement that the purchaser must pay cash was not unreasonable or insisted upon by the mortgagee in order to get the property at less than its value or to deprive the plaintiff of further opportunity to redeem. The purchaser, who is joined as a defendant, was present during the negotiations, and when the property was struck off the mortgagee furnished the money to pay for it. If the mortgagee had previously hindered

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the plaintiff from raising the money, or sought to prevent him from bidding, the vendee would not have been an innocent purchaser for value and without notice of his conduct, and the foreclosure would have been invalid. *Gilson* v. *Nesson*, 208 Mass. 368, 371. *Wenz* v. *Pastene*, 209 Mass. 359. But the master having found that the mortgagee did nothing to hinder or delay the plaintiff, who had a reasonable opportunity to raise the money, the sale cannot be vitiated on this ground. The price not having been grossly inadequate, and the mortgagee not being chargeable with bad faith, the plaintiff has failed to sustain the essential averments upon which he relied for relief, and the decrees of the Superior Court overruling the plaintiff's exceptions to the supplemental report, and confirming the report, and the final decree dismissing the bill, should be affirmed. *Fennyery* v. *Ransom*, 170 Mass. 303, 306, 307, and cases cited.

Ordered accordingly.

HENRY W. BRAGG, administrator, *vs.* CHARLES A. LITCHFIELD & others.

Middlesex. March 19, 1912. — May 24, 1912.

Present: MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Devise and Legacy, Cy pres, What estate, Intestacy. *Charity. Widow.*

The residuary clause of a will gave all the residue of the testator's property to his widow for her life and gave her "full power to sell, exchange, invest and reinvest the same," except certain real estate thereinafter specifically devised, and also contained specific devises of real estate to two charitable institutions to take effect after the death of the widow with limitations over to a niece of the testator in case within twenty years after the widow's death the institutions were dissolved or removed from the Commonwealth, and also pecuniary legacies amounting to $61,000 to many other charitable corporations. *Held*, that it did not appear from the will that the testator had any general intent to give to charitable purposes all of the residue of his estate not given to his widow.

The residuary clause of a will read as follows: "All the rest and residue of my estate . . . I give, devise and bequeath unto my wife, N; to have and to hold during her natural life. And she shall be entitled to have and receive the rents, income, interests, dividends and profits from said rest and residue during her natural life, precisely the same as I might do, were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same . . . [subject

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to certain exceptions] . . . At her decease I give, devise and bequeath said rest and residue as follows:" Then followed specific devises of real estate and pecuniary legacies amounting to $61,000 to many charitable corporations. The residuary estate was far in excess of the property disposed of by specific devises and legacies. *Held*, that the widow took a life estate only in the residue, and that there was an intestacy after her death as to so much of the estate as was not disposed of by specific devises and legacies. *Held, also*, that it appeared from the will that the testator intended that the provision which he had made for his widow should be a full and final provision for her, and therefore that she could not share in the intestate estate as a statutory heir.

MORTON, J. This is a bill for instructions by the administrator *de bonis non* with the will annexed of William Litchfield, late of Lexington. The testator died on March 4, 1904, leaving a widow but no issue. The will is dated January 30, 1900, and after providing for the payment of his debts specifically devises to the testator's niece, Ida B. Litchfield, two parcels of real estate with limitations over in case she leaves no issue; and to his wife all his furniture, glass, silverware, books, pictures and articles of use and ornament. Certain provisions as to his burial lot follow, and then comes the fifth clause which we quote:

"Fifth. All the rest and residue of my estate, of whatever name or nature and wherever the same may be, or be situated, I give, devise and bequeath unto my wife, Nancy J. Litchfield; to have and to hold during her natural life. And she shall be entitled to have and receive the rents, income, interests, dividends and profits from said rest and residue during her natural life, precisely the same as I myself might do, were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same (except the three houses I hereinafter devise to the 'Winchester Home for Aged Women,' and the three hereinafter devised to the 'Perkins Institution and Massachusetts School for the Blind' which I do not wish sold or exchanged for twenty years at least). But should she deem it necessary, or in her best judgment think it best to sell, and give a good and sufficient deed of any property other than the six estates above mentioned and the two estates above devised to my niece Ida B., within named, she is at liberty to do so. At her decease I give, devise and bequeath said rest and residue as follows:"

Next come (also as a part of the residuary clause) specific devises of real estate to the Perkins Institution and Massachu-

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setts School for the Blind and to the Winchester Home for Aged Women, with limitations over the testator's niece Ida B. Litchfield, in case either of said institutions should within twenty years after his wife's death be dissolved or removed from the Commonwealth. Lastly (also as a part of the residuary clause) there are fourteen pecuniary legacies to as many charitable corporations and institutions of various sums amounting in the aggregate to $61,000. There are no further devises or bequests. At the time of his death the testator's property amounted to $161,044.35, of which the personal was $97,994.35 and the real $63,050. The widow caused all the personal property in excess of the sum of $61,000 to be transferred into her name. The $61,000 she retained in her hands and possession as executrix of her husband's will. She also sold three parcels of real estate and took over the proceeds into her own name. The amount of the property transferred by her into her own name was $52,000. It was kept separate by her from her other funds and securities, and at her death came into the possession of the executor of her will, who is the plaintiff in this case. Since the death of the widow the plaintiff has paid the $61,000 and accumulations to the parties entitled thereto.

The specific devises and legacies and the legacies and devises given in the residuary clause do not dispose of the entire estate, and the question is whether there is an intestacy as to what is not disposed of, and if not, where it goes. The heirs at law and next of kin of William Litchfield, the testator, contend that it is intestate property and goes to and should be divided amongst them. A subsidiary question on this branch of the case is whether in that event the widow takes as a statutory heir. The executor of the will of the widow and the legatees and devisees named therein contend that it passed under the terms of the will to her and should be disposed of as a part of her estate. The charitable institutions and corporations named in the residuary clause contend that it should be divided amongst them *pro rata* in augmentation of the pecuniary legacies and specific devises given to them.

We take up this last contention first. The ground on which it is urged is that the will shows an intention on the part of the testator to devote the rest and residue subject to the widow's life estate to charitable purposes, and that a case is therefore presented for the application of the doctrine of *cy pres* and that a disposition

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of the rest and residue amongst the charitable institutions and organizations named in the residuary clause, in proportion to the several legacies and devises given to them will best carry out the intention of the testator. The doctrine of *cy pres* applies only where there is a general charitable intent which otherwise will be defeated. In this case we discover no general charitable intent as to the disposition of what is left of the rest and residue. The most that can be said is that the legacies and devises that were given to the charitable institutions named indicate a charitable disposition towards these objects of the testator's bounty. But that is far from showing an intention to devote all the rest and residue to charitable purposes. So far as the institutions named are concerned the general words of the residuary clause are limited by the amounts specifically given to them. So far from there being a general charitable intent, the contrary is shown by the limitation over to Ida B. Litchfield of the real estate devised to the Perkins Institution and Massachusetts School for the Blind and the Winchester Home for Aged Women, in case either or both of those institutions should be dissolved or should remove from the Commonwealth within twenty years after the death of his wife. What the testator would have done if his attention had been called to the fact that the pecuniary legacies and specific devises did not dispose of the entire rest and residue, is wholly a matter of conjecture. It is possible that they did at the time when the will was made. There is nothing to show the amount of property which the testator then possessed. Whether, if a case were presented for the application of the doctrine of *cy pres* a distribution *pro rata* of what remains amongst the charitable institutions named would best carry out the intention of the testator need not be considered, since we are of opinion that no such case is presented.

It is plain, we think, that the widow took only a life interest in the rest and residue. The language is: "All the rest and residue of my estate . . . I give, devise and bequeath unto my wife, Nancy J. Litchfield; to have and to hold during her natural life. . . . She shall be entitled to have and receive the rents, income, interests, dividends and profits from said rest and residue during her natural life, precisely the same as I myself might do, were I living." Then follows a power to sell, exchange, invest and reinvest subject to certain exceptions, and "at her decease," the tes-

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tator says, "I give, devise and bequeath said rest and residue as follows." Though the words "To have and to hold during her natural life" are separated by a semicolon from what precedes them, they are to be taken in connection therewith, and they show the nature of the estate which is given to the widow. This is further shown by the provision that she is to have the income "during her natural life," and by the provision for the disposition of the said rest and residue at her decease. Neither the fact that she was given a power to sell, nor the fact that the testator failed to dispose of all of the rest and residue enlarges the life estate given to her. The case is not one where with the right to the income is given an absolute power of disposition as in *Cummings* v. *Shaw*, 108 Mass. 159, and *Hale* v. *Marsh*, 100 Mass. 468, or where, as in *Chase* v. *Chase*, 132 Mass. 473, there was an absolute and unqualified gift of the use, income and improvement of the estate without any limitation over. The case is readily distinguishable from *Hayward* v. *Rowe*, 190 Mass. 1. The result is that the balance remaining undisposed of must be regarded as intestate property. See *Stearns* v. *Stearns*, 192 Mass. 144.

The only question that remains is whether the widow shared in the intestate property as a statutory heir. A legacy or devise to one who is an heir at law or a statutory heir will not prevent him from taking as heir at law or as a statutory heir in case of a partial intestacy unless it is manifest from the whole will that there was an intention to exclude him on the happening of such an event. *Johnson* v. *Goss*, 132 Mass. 274. *Jones* v. *Gane*, 205 Mass. 37. *Walton* v. *Draper*, 206 Mass. 20. In the present case we think that it appears from the will taken as a whole that the testator intended the provision which he made for his widow to be a full and final provision for her. He specifically bequeathed to her all his "furniture, glass and silver ware, books, pictures and articles of use and ornament." Then he directed that she should have the rents, income, interests, dividends and profits from the rest and residue "during her natural life, precisely the same as I myself might do, were I living"; and added to this "full power to sell, exchange, invest and re-invest the same," and in conclusion provided for the disposition of the rest and residue at her decease. The unavoidable inference from this is, we think, that he intended that she should have the entire use, benefit and improvement of the

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rest and residue during her life, and to that end clothed her with full power to manage the same as she should think best, but that he did not intend that she should have any part of the principal of the estate except the furniture, glass, etc. which he specifically bequeathed to her.

The result is that that portion of the estate which is undisposed of will go to and be divided and distributed amongst the heirs at law of William Litchfield.

So ordered.

H. W. Bragg, administrator, stated the case.

Asa P. French, for Charles A. Litchfield and others.

R. B. Stone, for the Boston Children's Aid Society.

H. Wheeler, for the Children's Hospital and others.

C. A. McDonough, for the estate of Nancy J. Litchfield.

H. H. Folsom, pro se and for certain heirs at law and next of kin of William Litchfield, submitted a brief.

ALEXANDER McLELLAN *vs.* BOSTON & MAINE RAILROAD.

Middlesex. March 26, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Agency, What constitutes. *Negligence*, Railroad.

Where a contractor is engaged in constructing for a railroad company an abutment for a bridge to be placed across the railroad under a contract which provides that the work shall be done under the general direction of a civil engineer of the railroad company, and the contractor, being obliged to get certain elevations and lines from the engineer, sends one of his employees to do in that regard what he is asked to do by the engineer, such employee while performing such duty under the engineer's direction does not become a servant of the railroad company.

At the trial of an action against a railroad company for personal injuries there was evidence that the plaintiff was an employee of a corporation which was constructing for the defendant abutments for bridges across the railroad tracks under a contract providing that the work should be done under the general direction of the defendant's civil engineer, that the plaintiff under orders from his employer was assisting the engineer in marking levels and elevations about the abutment and was standing on a plank, which rested in part on a form into which concrete for the abutment was being put and extended beyond the form toward the track, when the end of the plank which projected toward the railroad track was

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struck by a passenger train passing on the track and he was injured, that before the accident the plank had been in position three or four hours during which trains frequently had passed, that the track curved away from the abutment at that point, that, because of the construction of the abutment, the railroad company maintained a flagman there to inform engineers of approaching trains about the work going on and to warn men standing on the timbers around the abutment of the approach of trains. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury.

TORT for personal injuries received by the plaintiff while at work for the Coughlin and Shiels Company, a corporation which was constructing for the defendant certain abutments for the support of a bridge over the railroad at Lowell Street in Somerville. Writ dated January 17, 1910.

In the Superior Court the case was tried before *Sherman*, J. The facts are stated in the opinion. At the close of the evidence, the defendant asked for a ruling that there was not sufficient evidence to justify a verdict for the plaintiff. The ruling was refused. The jury found for the plaintiff in the sum of $500; and the defendant alleged exceptions, which after the resignation of *Sherman*, J., were allowed by *Fox*, J.

L. T. Trull, for the defendant.

W. M. Noble, (*H. R. Morse* with him,) for the plaintiff.

RUGG, C. J. This is an action of tort at common law. The plaintiff was at work for an independent contractor who was constructing an abutment for the support of a bridge over the tracks of the defendant. The plaintiff was directed to assist a civil engineer of the defendant in marking levels and elevations about this abutment. In order to perform his work he was obliged to get upon some forms in which concrete for the abutment was being put. The plaintiff to reach his place of work used a plank, one end of which rested on the form, and the other at some point away from the tracks. He had stood upon this plank in the performance of his work for a considerable time, during which several trains passed, when a passenger train struck the plank then projecting over the form, causing the plaintiff to fall and be injured. The plank had been in position three or four hours before the accident, during which trains had been passing frequently. There was evidence that the defendant had furnished a flagman, because of the construction of the abutment, who had flagged trains and warned men standing on the timbers at the abutment of the

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approach of trains, and that his place of duty was near the abutment.

1. It could not have been ruled rightly as matter of law that the plaintiff was a servant of the defendant. He had been directed by his master, who was the contractor for the construction of the abutment, to help the engineer of the defendant and do whatever was asked of him. There was a provision in the contract between the defendant and the builder of the abutment that the work should be done under the general direction of the engineer of the defendant. The contractor was obliged to get the elevations and lines from the engineer of the railroad, and the plaintiff was sent in the performance of his employer's duty to do what in this regard he was asked to do by the defendant's engineer. This is different from lending the plaintiff to a third person and placing him absolutely in the control of another. The circumstances of the present case distinguish it from *Delory* v. *Blodgett*, 185 Mass. 126. It is more nearly like *Hooe* v. *Boston & Northern Street Railway*, 187 Mass. 67, and *Byrne* v. *Farnum*, 188 Mass. 219.

2. The plaintiff's due care also appears to have been a question for the jury. Although he knew that the place in which he was at work was dangerous, he also knew that the plank upon which he was standing had been for a considerable time before the accident in such position as not to be within the reach of passing trains. It cannot be pronounced negligence in him as matter of law that he continued to use it without constant inspection of its possible change of location when others were passing near it, and of the character of trains approaching.

3. The question of the defendant's negligence is a close one, but on the whole we incline to the view that it was for the jury. Although the direct cause of the accident was a striking of the plank by a passenger coach upon a moving train, the precise reason why this occurred is not plain. The plank may have projected farther toward the rail, or the passenger coach may have been slightly wider than those on other trains which had passed, or the trucks and body of the car may have been so arranged that the end may have swept farther from the rail as the train passed around the curve of the track at the abutment. Moreover, it might have been inferred that one of the duties of the flagman was to warn those upon the abutment in any danger from passen-

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ger trains, as well as to warn those in charge of the train of danger at the abutment. The situation was one which called for a high degree of care from both engineer and flagman of the defendant in order to avoid the results of a collision. Under these circumstances, failure on their part to perceive a plank projecting so far as to strike a car cannot be said as matter of law to have been lacking in negligence. See *Colford* v. *New England Structural Co.* 205 Mass. 283.

Exceptions overruled.

FARR ALPACA COMPANY *vs.* COMMONWEALTH.

Suffolk. March 26, 27, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Tax, Excise. *Corporation*, Taxation. *Constitutional Law*, Excise tax.

The tax upon a domestic corporation provided for by St. 1909, c. 490, Part III, § 43, is an excise upon its franchise and not a tax upon its property.

Wool, purchased in a foreign country by a Massachusetts manufacturing corporation owning only real estate, machinery and merchandise, and by it brought to this Commonwealth and entered for warehousing in a United States bonded warehouse where it remains in the original packages subject to an unpaid duty to the United States, is not property of the corporation "situated in another State or country and subject to taxation therein," the value of which, under St. 1909, c. 490, Part III, § 41, cl. 3, § 43, is to be deducted from the value of the corporate franchise, or from the value of its real estate, machinery and merchandise, in ascertaining the basis for computation of the excise provided for by the statute.

In St. 1909, c. 490, Part III, § 43, which among other things provides in substance that in computing the excise to be paid by a domestic corporation as provided by that act, an amount, less certain deductions provided for in § 41, "twenty per cent in excess of the value . . . of [the corporation's] works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in the Commonwealth would be liable to taxation" is to be taken as a basis for the computation in case the value of the corporate franchise as ascertained by the tax commissioner exceeds that amount, the word "merchandise" includes wool purchased in a foreign country by such a corporation and by it brought to this Commonwealth and entered for warehousing in a United States bonded warehouse where it remains in the original packages subject to an unpaid duty to the United States; and such a construction of the statute does not affect its constitutionality.

PETITION under St. 1909, c. 490, Part III, § 70, filed in the Supreme Judicial Court on November 13, 1911, and amended by

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substituting a new petition on February 23, 1912, by a corporation organized under the laws of this Commonwealth, seeking the abatement of a part of an excise tax assessed upon the petitioner under §§ 41, 43 of the statute.

Such portions of § 41 of the statute as are material to the case are as follows:

"The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding section, and shall estimate therefrom the fair cash value of all of said shares constituting its capital stock on the preceding first day of May, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

. . . . . .

"Third, In case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the Commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation; also the value of its property situated in another State or country and subject to taxation therein; but the tax commissioner in determining for the purposes of taxation the value of the corporate franchise of any such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it.

"Fourth, In case of corporations subject to the requirements of the preceding section, other than railroad corporations, telegraph, telephone, street railway and electric railroad companies, whether chartered or organized in this Commonwealth or elsewhere, and of domestic business corporations, the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated.

"For the purposes of this section the tax commissioner may take the value at which such works, structures, real estate, ma-

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chinery, poles, underground conduits, wires and pipes are assessed at the place where they are located as the true value, but such local assessment shall not be conclusive of the true value thereof."

Material portions of § 43 are quoted in the opinion.

The case was reserved by *Braley*, J., upon the pleadings and an agreed statement of facts for determination by the full court.

From the agreed statement of facts it appeared that, proceeding under the statute, the tax commissioner ascertained the true value of the petitioner's corporate franchise to be $9,840,000. The value of its real estate and machinery he determined to be $2,560,720, and the value of its merchandise to be $1,936,023, of which $549,190 represented the wool imported by the petitioner and remaining in a United States bonded warehouse, as stated in the opinion. The sum of the values of the real estate, machinery and merchandise was therefore found to be $4,496,743, and a sum twenty per cent in excess thereof to be $5,396,091. The value of the corporate franchise being in excess of this last amount, a tax was levied under § 43 of the statute upon that amount, $5,396,091, less deductions authorized by § 41, cl. 3. In making such deductions, the tax commissioner deducted only the value of the petitioner's real estate and machinery, $2,560,720, leaving as the sum upon which the tax was levied $2,835,371.

The petitioner contended that, in ascertaining under § 43 the "amount, less" the deductions authorized by § 41, "twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery . . . and merchandise, and of securities which if owned by a natural person resident in the Commonwealth would be liable to taxation," the wool described in the opinion should not be included; and that it should be included in the amounts to be deducted under § 41, cl. 3, as "property situated in another State or country and subject to taxation therein." The petitioner also contended that, so far as the wool in bond was concerned, if the statute did not mean what it contended it meant, it was unconstitutional as being repugnant to the clause of the United States Constitution declaring that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; "

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and repugnant to the clause of the United States Constitution which declares that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

A. L. Green, (*F. F. Bennett* with him,) for the petitioner.

A. Marshall, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. This is a petition for abatement of an excise levied under St. 1909, c. 490, Part III, §§ 41, 43, upon a corporation organized under the laws of this Commonwealth. The petitioner owned wool valued at $549,190.32 purchased abroad, brought by it to this country, and entered for warehousing by it in a United States bonded warehouse at Holyoke in this Commonwealth. The controversy revolves about this item. It was in the original packages subject to an unpaid duty to the United States, and it had remained the property of the petitioner from the time of its purchase in a foreign country. The tax commissioner ascertained the true market value of the shares of the capital stock of the petitioner from its return to be $9,840,000, and this was "taken as the true value of its corporate franchise," under § 41. From this was deducted the value of the petitioner's real estate and machinery in Holyoke subject to local taxation. Section 43 provides that every corporation, subject to its provisions, shall pay an annual excise tax "upon its corporate franchise, after making the deductions provided for in section forty-one" at a specified rate, with the further provision that the "tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation." The value of the petitioner's corporate franchise was so large that its tax was required to be levied under the clause just quoted.

The tax provided by this section is an excise upon the franchise of the corporation, and not a tax upon its property. Our statutes, however, levying an excise upon corporate franchises, exhibit a

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progressive tendency to prevent the technical distinction between excises and property taxes from resulting in double taxation. *Tremont & Suffolk Mills* v. *Lowell*, 178 Mass. 469, 471. The twenty per cent limitation appeared first in St. 1903, c. 437, § 74, and in view of the report of the committee which was the basis of this statute may have been enacted for the purpose of putting domestic corporations more nearly upon an equality with foreign corporations, and lessening the discrimination against domestic corporations which had theretofore existed. See *New England & Savannah Steamship Co.* v. *Commonwealth*, 195 Mass. 385, 389, 390. But the act and the report of the committee manifest no intention to put the excise levied upon a domestic corporation upon an equality with the property taxes to be assessed upon individuals. An examination of the details of the successive corporation taxes and the deductions which they severally provide from the value of the franchise before levying the tax show merely a policy of avoiding what might in some instances be double taxation as to property located outside of the Commonwealth, and lessening the rigor of the domestic corporation tax. See St. 1864, c. 208, § 5; St. 1865, c. 283, § 5; Pub. Sts. c. 13, § 14; R. L. c. 14, §§ 38, 40; St. 1902, c. 342, § 3; St. 1903, c. 437, §§ 72, 74; St. 1904, c. 261.

In determining the true value of the petitioner's corporate franchise, the wool which it owned in the bonded warehouse necessarily was taken into account. The first question is whether it should be included under clause third of § 41, which provides that the value of "the works, structures, real estate, machinery . . . also the value of its property situated in another State or country and subject to taxation therein" shall be deducted from the true value of the corporate franchise before the excise is computed. It is plain that the wool should not have been deducted under this clause. Whether it could be said to be constructively in another State or country because in a bonded warehouse from which it might have been exported without the payment of duty, although physically in this State, it certainly was not "subject to taxation therein." Hence it was not within the description of property that should be deducted.

It is strongly urged, however, that it should not have been included as a part of the value "of the works, structures, real estate, machinery . . . and merchandise, and of securities which

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if owned by a natural person resident in this Commonwealth would be liable to taxation," to which twenty per cent may be added before the excise is computed. The determination of this question depends upon the definition and scope of "merchandise" as used in the statute. Plainly, it does not refer to merchandise which "if owned by a natural person in the Commonwealth would be liable to taxation." That fraction going to make up the total value is confined to "securities" as the last antecedent by the punctuation and by the grammatical construction of the sentence. Moreover, in the interpretation of the franchise excise law, the court has uniformly followed the general principle of statutory interpretation that express mention of items by implication excludes other matters not mentioned. *Commonwealth* v. *New England Slate & Tile Co.* 13 Allen, 391. *American Glue Co.* v. *Commonwealth,* 195 Mass. 528, 530. It seems clear that the word "merchandise", as used in this statute, includes wool. It was said in *New England & Savannah Steamship Co.* v. *Commonwealth,* 195 Mass. 385, referring to the same word in the earlier statute, "the word 'merchandise', so far at least as respects chattels, must be construed as including tangible property which may be the subject of sale." There is nothing in the context to indicate that it is used in any other than its natural significance. It includes the merchandise of the petitioner wherever situated, and under whatever circumstances it may be held, provided only that it is not subject to taxation in some other State or country. Great reliance is placed by the petitioner upon the sentence in the opinion of the *American Glue Co.* v. *Commonwealth,* 195 Mass. 528, at 531, to the effect that "The object of this later section [now § 43] is to limit the taxation, by establishing a maximum which is founded upon the amount of property held by the corporation that would be taxable if held by an individual, apart from the value of its franchise and other assets which are not subject to taxation as property, and to prohibit a charge in excess of twenty per cent above the percentage upon this amount." Strictly construed, this language gives some color to the petitioner's contention, but it was used with an entirely different purpose as to a quite different state of facts, and was not intended to apply to a case like the present. Every judgment must be read with respect to the facts with which it was dealing. As contended by

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the Commonwealth, the language referred to property of a taxable nature, and not property technically subject to taxation in this Commonwealth. The point now to be determined is not whether the merchandise would be taxable if held by an individual, but whether the Legislature has directed that it be included or excluded in determining the amount upon which the excise shall be computed. It is included in the ascertainment of true franchise value provided for in the first part of § 41. It is not included in the deductions mentioned in clause third of the same section. It is comprehended by fair intendment in the enumeration of items for determining the value of the property to which the twenty per cent shall be added before the excise is computed. That in ascertaining the franchise value for the purpose of levying the excise consideration has been given to the ownership of property which is not subject to taxation does not impair the validity of the excise. *Commonwealth* v. *Hamilton Manuf. Co.* 12 Allen, 298.

As thus construed, the statute is not obnoxious in the provision of the Constitution of this Commonwealth or of the United States of America.

It is imposed not upon the assets or physical property of the corporation, but upon the franchise granted by the sovereign power. The right to exist and carry on business as a corporate entity, a privilege bestowed by the State and not existing as a natural right, is the "commodity" which is subject to the power of the Legislature for the purpose of laying an excise under c. 1, § 1, art. 4 of the Constitution of this Commonwealth. It is not a property tax. If regarded as a property tax it would violate the Constitution of the Commonwealth, which in the same article requires all taxes upon property to be proportional. This is not proportional. It is valid, however, because reasonable in its operation and levied upon the franchise of the corporation, which is its capacity to exist, to combine capital and to do business in a corporate form. This has been the consistently continuous attitude of this court manifested in many decisions covering almost a century in construing tax laws enacted from time to time by the Legislature under the grant of power to it in the Constitution. Our system of corporation taxation is founded upon these principles. This has been decided too many times to require a cita-

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tion of all the authorities, but some of the leading ones are collected in a footnote.*

This principle of raising revenue was first adapted to general business corporations by St. 1864, c. 208. Its constitutionality was upheld in *Commonwealth* v. *Hamilton Manuf. Co.* 12 Allen, 298; *S. C. Hamilton Manuf. Co.* v. *Massachusetts*, 6 Wall. 632. The aspect presented to the Supreme Court of the United States was this: The excess of the market value of the capital stock of the business corporation above the deductions made for real estate and machinery taxed locally as property upon which the excise was levied was made up in part by a substantial investment in bonds exempt from State taxation under the law of the United States. It was urged that in effect the excise so calculated was a tax on property. Plainly the statute could not stand if it imposed a tax on property. But it was held that under our Constitution and judicial decisions property taxes and excise taxes were "perfectly distinct;" that the excise should be upheld as a franchise tax upon the commodity of being a corporation, and that it was "not possible to withhold from the conclusion [reached by the Supreme Judicial Court of Massachusetts] a full and unqualified concurrence." That case is not distinguishable in principle from the present. In that as in this the gauge by which the amount of the excise upon the franchise was measured was affected directly by the ownership by the corporation of property wholly exempted as property from taxation by the State under the Federal Constitution. Imports are not subject to taxation, directly or indirectly,

* *Portland Bank* v. *Apthorp*, 12 Mass. 252. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148. *Connecticut Mutual Life Ins. Co.* v. *Commonwealth*, 133 Mass. 161. *Firemen's Fire Ins. Co.* v. *Commonwealth*, 137 Mass. 80. *Boston Manuf. Co.* v. *Commonwealth*, 144 Mass. 598. *Tremont & Suffolk Mills* v. *Lowell*, 178 Mass. 469. *Worcester* v. *Board of Appeal*, 184 Mass. 460, 465. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239. *New England & Savannah Steamship Co.* v. *Commonwealth*, 195 Mass. 385. *Commonwealth* v. *Cary Improvement Co.* 98 Mass. 19, 23. *Commonwealth* v. *Berkshire Life Ins. Co.* 98 Mass. 25, 27. *Manufacturers' Ins. Co.* v. *Loud*, 99 Mass. 146. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381. *Greenfield Savings Bank* v. *Commonwealth*, 211 Mass. 207. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, *ante*, 35.

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by a State. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. Imports in a United States bonded warehouse are no more free from State taxation than United States bonds. But if the corporate entity is more valuable and its potentiality for the transaction of business greater because of the ownership of tax exempt property, that circumstance affords no reason for not imposing upon the commodity of being a corporation an excise, the amount of which is increased by reason of such ownership. It is conceivable that a corporation might be organized under our law which should deal exclusively in goods in United States bonded warehouses. It could hardly be contended that such a corporation would be freed from all liability to contribute to the support of the government. The franchise enjoyed by it as a grant from the government might be of great value and yield large profits. *Hamilton Manuf. Co.* v. *Massachusetts*, 6 Wall. 632, has been cited with approval often by the Supreme Court of the United States, and has never been limited, narrowed or overruled. In the latest discussion of the subject by that court, in *Flint* v. *Stone Tracy Co.* 220 U. S. 107, it was said at 163: "The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

The excise in the case at bar meets the test of this distinction. Our excise tax upon corporate franchises is sound in principle, reasonable in its operation, and has stood under the protection of so many decisions of this court and an express judgment in its favor of the Supreme Court of the United States, that it is not open to successful assault. *Home Ins. Co.* v. *New York*, 134 U. S. 594. *Snyder* v. *Bettman*, 190 U. S. 249, 254. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 516. *Plummer* v. *Coler*, 178 U. S. 115, 125, 127. *Murdock* v. *Ward*, 178 U. S. 139, 147. *Ashley* v. *Ryan*, 153 U. S. 436, 445. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210.

Petition dismissed with costs.

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WILLIAM A. BURNHAM & another, trustees, *vs.* TREASURER AND RECEIVER GENERAL.

Suffolk. March 27, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Tax, On legacies and successions. *Power. Constitutional Law.*

By St. 1909, c. 527, § 8, a succession tax is imposed upon the equal distribution of certain property among the children of the beneficiary for life under a deed of trust, made before September 1, 1907, in accordance with a provision of the deed, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to him by the deed to fix the proportions in which such property should be distributed among his children or grandchildren. The statute as so applied is constitutional.

MORTON, J. The question in this case is whether the trust estate is liable to a succession tax under the provisions of St. 1909, c. 527, § 8, or of St. 1907, c. 563, codified as St. 1909, c. 490, Part IV. The Probate Court held that it was liable to such tax under the provisions of St. 1909, c. 527, § 8, and entered a decree accordingly. The petitioner appealed. The case was reserved by a single justice for this court "upon the pleadings, decree, claim of appeal therefrom, and objections thereto, and agreed statement of facts."

We think that the decree of the Probate Court was right and should be affirmed. The terms of the indenture of trust under which the question arises are so far as material as follows: "And upon the further trust from and after the death of the said John A. [Burnham] to pay over to his children or grandchildren, if any, in such proportion as he may by will direct, and in the absence of any such will in trust to pay over, transfer and convey all said property and estate to the children of said John A. and to the children of any deceased child of said John A. equally, grandchildren taking the portion that would have fallen to their parent if alive. And if the said John A. leave no children nor grandchildren then in Trust to pay over, transfer and convey all said property to the heirs at law of said John A."

John A. Burnham was the son of the settlor and died on Novem-

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ber 10, 1910, without having exercised the power. At the time of his death he was a resident of this State. He left three children, amongst whom the trust estate is now to be divided. The indenture of trust was dated October 30, 1869.

St. 1909, c. 527, § 8, is as follows: "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

It is clear that John A. Burnham possessed a power of appointment derived from a disposition of property made before September 1, 1907, and that he has omitted or failed to exercise the same within the time provided therefor. To that extent at least the case is within the express terms of the statute. The power of appointment was a limited one and the question is whether effect is to be given to the failure or omission to exercise it like that which the court held in *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, was to be given to the failure or omission to exercise a general power of appointment. If the donee had exercised the power of appointment it seems plain that although the power was a limited one the statute would have applied. *In re estate of Dows*, 167 N. Y. 227.

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In re estate of Cooksey, 182 N. Y. 92. *Orr* v. *Gilman*, 183 U. S. 278. *Chanler* v. *Kelsey*, 205 U. S. 466. It would have applied because the donee would have been regarded as the source of the succession. By his failure to act he equally affected the course of the succession according to the doctrine laid down in *Minot* v. *Treasurer & Receiver General, supra.* Until the death of the donee and his exercise or failure to exercise the power of appointment it could not be known in what proportions the children or grandchildren would take. Until that event happened the estate in the children did not become complete and the succession was not fully determined. It cannot be said therefore that the estate had so vested in the children as to render the imposition of a tax under the statute above referred to unconstitutional.

Even if the remainder had vested in equal parts absolutely in the children before the death of the donee of the power, it would not follow that the tax was invalid. The tax, as was said in *Attorney General* v. *Stone*, 209 Mass. 186, 190, "is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. . . . The privilege is not fully exercised until the property shall have come into the possession of the beneficiary." The tax would be valid therefore as a tax levied upon the privilege exercised by the beneficiaries on their coming into the possession and enjoyment of the property. See *Keeney* v. *Comptroller of the State of New York*, 222 U. S. 525.

Decree affirmed.

R. F. Sturgis, for the petitioners.
F. T. Field, for the respondent.

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HUGH W. ROBERTS, JR., *vs.* AVARD J. VROOM & another.

Suffolk. March 28, 29, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. *Negligence. Evidence,* Competency, Opinion: experts.

In an action by a workman against his employer for personal injuries caused by the breaking of the boom of a derrick which fell upon the plaintiff, where it appeared that the derrick was purchased as a second hand one, the defendant excepted to the admission of evidence of the price paid by the defendant for the derrick. There was no evidence as to the cost of a new derrick. *Held,* that the exception could not be sustained because it did not appear that the admission of the evidence harmed the defendant.

In an action by a workman against his employer for personal injuries caused by the breaking of the boom of a derrick which fell upon the plaintiff, where there is evidence warranting a finding that the boom was defective because its inside was permeated with dry rot, the plaintiff also may introduce the testimony of an expert to the effect that the boom gave way by reason of a "crimp," described as a diseased condition which cuts the fibre of the wood, and that the "crimp" could have been ascertained by sounding with a hammer, the plaintiff not being restricted to evidence showing a single defect in the boom.

In an action by a workman against his employer for personal injuries caused by the breaking of the boom of a derrick which fell upon the plaintiff, where there is evidence warranting a finding that the boom was defective because its inside was permeated with dry rot and it appears that the boom was being used to lift material varying from one quarter of a ton to two tons in weight, an expert may be allowed to give his opinion as to the sufficiency of such a boom for general work of that character.

TORT for personal injuries sustained by the plaintiff on December 17, 1909, when he was in the employ of the defendants and was at work on a school house which the defendants were building for the city of Lynn, from the breaking of a derrick boom which fell and struck the plaintiff. Writ dated January 15, 1910.

The declaration contained three counts, two under the employers' liability act, and the third at common law alleging a failure of the defendants to provide safe and suitable machinery and appliances. At the trial in the Superior Court before *Stevens,* J., the plaintiff waived the first two counts. It was admitted that at the time of the accident the plaintiff was in the exercise of due care.

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The material facts which could have been found upon the evidence are stated in the opinion. The case was submitted to the jury upon the third count. The jury returned a verdict for the plaintiff in the sum of $6,000; and the defendants alleged exceptions, relating to the admission by the judge of evidence introduced by the plaintiff in regard to the price paid for the derrick, in regard to a "crimp" in the boom as a defect distinct from rottenness, and the opinion of an expert that the boom was not a proper one for the purpose for which it was being used. In the brief of the defendants at the argument before this court it was stated that "there was evidence from which the jury could find that the boom was defective in that it was rotten on the inside."

E. K. Arnold, (*W. B. Luther* with him,) for the defendants.

F. P. Garland, for the plaintiff.

BRALEY, J. The plaintiff while at work for the defendants suffered personal injuries by the breaking of a derrick boom, and no contention is made as to his due care, or that the verdict on all the evidence was unwarranted, but the defendants ask for a new trial on the ground of alleged errors in the admission of evidence.

At the place of the fracture it was abundantly shown that the inside of the boom was permeated with dry rot, or, as described by the defendants' superintendent, the wood had become dead but not rotten. The distinction is immaterial. If either rotten or dead, the jury could say that the boom had lost its tensile strength and had become unsound. The jury had before them the evidence of the plaintiff's mechanical expert, whose qualifications were not questioned, that there was a general custom among contractors to examine second-hand derricks before they were used, to ascertain whether they were rotten, cracked or "crimped," by tapping with a hammer or boring with a small bit. If there is rotten or unsound wood the character of the resonance caused by the blow or the appearance of the chips will disclose its condition. When they came to consider the testimony of the only defendant who testified, the jury could have found, that the derrick was purchased from a dealer in second-hand derricks, and, if no inquiry was made as to its age, this defendant knew that after several months use on but one building it had been stored for eight or nine years, and that with knowledge of these circumstances, and relying on such information as could be obtained from visual

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inspection, it was used without any further examination to test its soundness. They were bound to provide reasonably safe appliances for the use of the plaintiff and his fellow workmen, and their duty had not been performed if by the exercise of due diligence this defective condition could have been ascertained and remedied.

The admission in evidence of the price which they paid does not appear to have harmed the defendants as there was no proof of the cost of a new derrick. *McGonigle* v. *Belleisle Co.* 186 Mass. 310, 312. *Scaplen* v. *Blanchard*, 187 Mass. 73.

Nor was the plaintiff restricted to proof of a single defect in the boom, but could offer evidence of any defective condition which might have caused the accident. *Droney* v. *Doherty*, 186 Mass. 205. If it gave way because of a "crimp", described in the evidence as a diseased condition which as it progresses finally cuts the fibre of the wood, the opinion of the expert, that from the nature and appearance of the fractured ends the boom parted from this cause, was clearly admissible. *Hand* v. *Brookline*, 126 Mass. 324. It also was shown by this witness, that the "crimp" could have been ascertained by sounding with a hammer, and it was a question for the jury on all the evidence whether the boom broke from either cause, or from both causes, and whether the defendants were chargeable with negligence in failing to discover the defect or defects. *Cahill* v. *New England Telephone & Telegraph Co.* 193 Mass. 415, 418.

The evidence showed, that the boom was being used to lift material required in the construction of the building varying from one quarter of a ton to two tons in weight. It probably might have supported safely a lighter burden, and because the jury would be aided by testimony from qualified experts as to its lifting capacity at the time of the accident, opinion evidence as to the sufficiency of the boom for general work of this character was rightly admitted. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *Lang* v. *Terry*, 163 Mass. 138.

Exceptions overruled.

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JAMES GETTINS *vs.* THOMAS J. KELLEY.

Suffolk. March 29, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. *Negligence,* Employer's liability. *Evidence,* Competency. *Witness,* Cross-examination.

No exception can be sustained to the refusal of a presiding judge to rule as matter of law that on the evidence the jury must find certain facts, which should be determined by the jury under suitable instructions.

In an action by a workman against his employer for personal injuries, in which a defense relied upon is that the injuries were caused by the negligence of a fellow workman, who died before the trial, where evidence of declarations of such fellow workman that the plaintiff was injured through his negligence has been admitted properly, evidence offered by the defendant to show that on the afternoon of the day of the plaintiff's injuries the defendant paid the fellow workman his wages is incompetent, as is also a declaration of the deceased fellow workman that he was blamed by others for having caused the injuries and had decided to leave the defendant's employ.

Questions allowed to be put to the defendant in an action of tort upon his cross-examination here were held not only to have been permissible as within the discretion of the presiding judge but also to have been plainly relevant to the issues on trial.

BRALEY, J. The bank of loam where the plaintiff was at work when injured had been undermined, and while he was shovelling the earth into a cart from the base of the pile the overhanging portion suddenly gave way, and in falling upon him caused personal injuries for which he seeks to recover damages both at common law and under R. L. c. 106, § 71, now St. 1909, c. 514, § 127. The case was submitted to the jury under each count, and after a general verdict for the plaintiff the case is here on the defendant's exceptions to the refusal of the presiding judge to rule as requested, which at the argument was confined to his denial of the fourth and seventh requests,* and to the admission and exclusion of evidence.

* The rulings thus requested and refused were as follows:

"4. On the evidence the plaintiff knew the work was being done in such manner that no warning was given unless fellow workmen were prying off dirt from top of bank. Hence, on the evidence he was not at the time of the accident relying on a warning if the earth fell of itself."

"7. On the evidence the plaintiff relied for notice that a portion of the

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Doubtless, as the defendant contends, the character of the work in which the plaintiff was engaged disclosed no complex conditions, yet the jury would have been warranted in finding that the plaintiff, without any previous experience and without any instructions as to the danger, had been ordered by one Magee, who acted as the defendant's superintendent, to take a position as a shoveller, where if the bank fell he very likely would be injured. *Lynch* v. *Allyn*, 160 Mass. 248. *Rafferty* v. *Nawn*, 182 Mass. 503. *Chiappini* v. *Fitzgerald*, 191 Mass. 598.

The workman does not assume the risk of negligence by a superintendent, and the plaintiff very properly could rely upon the presumption, that he would not be ordered by his superior to perform work where unless warned of the danger, he would be exposed to the chance of personal injury. *Proulx* v. *J. W. Bishop Co.* 204 Mass. 130. It also was the defendant's duty at common law to provide the plaintiff with a reasonably safe place where he could perform the work for which he had been hired, and to warn him of unsafe and dangerous conditions, unless they were plainly obvious. *Reardon* v. *Byrne*, 195 Mass. 146. *Ruddy* v. *George F. Blake Manuf. Co.* 205 Mass. 172, 180, 181. The plaintiff was rightly allowed to testify, that because of his previous inexperience he had not been aware that the unsupported bank might fall from its own weight, and as the jury could have found further that the place had become unsafe through the excavation, the defendant should have called his attention to the danger. *Reardon* v. *Byrne*, 195 Mass. 146. *Ruddy* v. *Geo. F. Blake Manuf. Co.* 205 Mass. 172, 180, 181. The jury also under each count were to pass upon the question, whether the plaintiff relied upon a warning to be given by one Magee as the work of removal proceeded, and the detached portion was about to fall, and if no warning came he assumed the risk.

The presiding judge correctly refused to rule as matter of law under the fourth and seventh requests, what the jury on all the evidence must decide under suitable instructions, which were given. *American Tube Works* v. *Tucker*, 185 Mass. 236.

The evidence introduced by the defendant, however, tended to

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bank was about to fall upon fellow workmen unless Magee happened to be present. If Magee was absent and no warning was given by fellow workmen and that was the cause of plaintiff's injury plaintiff can not recover."

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prove, that the accident was caused by the carelessness of one Grady, a fellow workman, and because of his death before the trial, his declarations, that the plaintiff was injured through his negligence were properly admitted in the defendant's testimony. R. L. c. 175, § 67. But the offer of proof, that on the afternoon of the day of the plaintiff's injuries the defendant paid Grady his wages, was incompetent. It was an act of the defendant distinct from any voluntary affirmative conduct on the part of the declarant, which could be construed as corroborative of his verbal statements.

The remarks of Grady, made to Magee, and offered in evidence, also were inadmissible. They were inferences or conclusions of fact which did not purport to be an acknowledgment of his fault, but only stated the opinion of others, that he was blamable, and this criticism having become unpleasant, he had decided to leave the defendant's employment.

If the exceptions to the questions admitted in the cross-examination of the defendant had not been pressed as being of importance, we should have noticed them only as coming within the rule of the judge's discretion laid down in *Jennings* v. *Rooney*, 183 Mass. 577, 579. It is certain, however, after examination, that the defendant's description of the nature of the soil, and mode of operation bore directly upon the questions of his alleged negligence, and the negligence of the superintendent.

The result is, that while the jury would have been justified in returning a verdict for the defendant, the exceptions disclose no error of law, and should be overruled.

So ordered.

T. W. Proctor, for the defendant.
James J. McCarthy, for the plaintiff.

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WILLIAM H. SULLIVAN *vs.* MARY L. MANDELL & another.

Suffolk. April 1, 1912. — May 24, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Sewer. Boston.

Under St. 1897, c. 426, §§ 2, 4, St. 1903, c. 268, the construction of a sewer in the city of Boston can be authorized only by the board of street commissioners with the approval of the mayor, and the superintendent of sewers of that city acting under direction of the mayor has no authority to construct a sewer not authorized by the board of street commissioners. A subsequent assessment by that board of betterments for a sewer so constructed does not operate as a ratification of acts originally unlawful and is void.

CONTRACT for the alleged breach of covenants of warranty and against incumbrances in a deed from the defendants dated and delivered on March 8, 1908, conveying to the plaintiff a certain lot of land in that part of Boston called Dorchester. Writ dated February 1, 1911.

In the Superior Court the case was tried before *McLaughlin*, J. The incumbrance complained of was a sewer assessment levied by a vote of the board of street commissioners of the city of Boston on December 8, 1908.

The plaintiff, subject to the defendants' exception, put in evidence a certified copy of the following notice recorded in the registry of deeds on the day of its date:

"City of Boston. Sewer Department. Nov. 28, 1906.

"The undersigned, the Superintendent of Sewers of the City of Boston, hereby states that it is his intention to construct a house sewer of 12 inch earthen pipe in Morton Street from Blue Hill Avenue about 410 feet westerly in the Dorchester District, and that he estimates that the cost thereof will be fourteen hundred and forty-five ($1,445.00) dollars. John J. Leahy, Superintendent of Sewer Department of the City of Boston. Approved John F. Fitzgerald, Mayor."

There was evidence that John J. Leahy, superintendent of sewers, was the officer designated by the mayor under St. 1903, c. 268, to construct sewers, and that after the filing of the notice

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he constructed a house sewer in Morton Street in front of the land conveyed by the defendants to the plaintiff; that work on the sewer was completed on January 31, 1907, and that on December 8, 1908, the superintendent of sewers certified the cost of the sewer to the board of street commissioners, who on the same day passed an order assessing a portion of the cost of the sewer upon the land in question.

It was admitted that there was no order of the board of street commissioners ordering the construction of the sewer or any order by that board in connection therewith before the order levying the assessment on December 8, 1908.

The defendants asked the judge to make the following rulings:

"1. On all the evidence the plaintiff cannot recover, and the verdict must be for the defendants.

"2. Neither the superintendent of sewers of the city of Boston nor any other official designated by the mayor of said city, has any authority to construct a sewer in said city and assess any part of the cost therefor on adjoining property, without a previous adjudication by the board of street commissioners of said city adjudging said sewer necessary for the public convenience or the public health.

"3. The notice of intention to construct a sewer in Morton Street, dated November 28, 1906, signed by John J. Leahy, superintendent of sewers of the city of Boston, recorded with Suffolk Deeds, Book 3172, 464, did not impose any lien or liability for assessment on the property deeded by the defendant to the plaintiff, as there was no order of the street commissioners of the city of Boston adjudging that said sewer was necessary for the public convenience or the public health."

The judge refused to make any of these rulings, and ordered judgment for the plaintiff. The defendants alleged exceptions.

The case was submitted on briefs.

S. M. Child & H. D. Moore, for the defendants.

C. W. Rowley, for the plaintiff.

BRALEY, J. By St. 1841, c. 115, the mayor and aldermen of the city of Boston were empowered, upon acceptance of the act, to lay, make and repair as public necessity and convenience might demand all main drains or common sewers within the municipality, which upon construction "shall be taken and deemed to

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be the property of such town or city." The statute having been accepted, the board whenever it adjudicated that a sewer was necessary could apportion and assess the cost of construction upon the proprietor of a particular drain which entered into the sewer either "for the draining of his cellar or land, or in obedience to the . . . ordinances of . . . the city, or who, by any more remote means, shall receive any benefit thereby for draining his cellar or land," and the assessment constituted a lien upon the estate for one year after it was laid. St. 1841, c. 115, §§ 2, 3. *Child* v. *Boston*, 4 Allen, 41, 48.

In the expansion and development of the city additional authority was required, and by the St. of 1857, c. 225, the board of aldermen were authorized to construct sewers through the land of any persons or corporations "as they shall adjudge to be necessary for the public convenience or the public health," and damages were to be assessed and recovered in the manner prescribed where land was taken "for public highways or streets." A further enlargement appears in the St. of 1873, c. 205, § 1, which provided, that "the board of aldermen of the city of Boston may for the purposes of sewerage and drainage, take and divert the water of any streams or water courses within the limits of said city, and devote the same to the purposes aforesaid; and may take all necessary land to widen, deepen or straighten the channel of such water courses, and pave, enclose and cover the same." And the St. of 1882, c. 164, having enacted that the words "mayor and aldermen" were to be construed as meaning "board of aldermen" this body until the St. of 1897, c. 426 was passed, continued to be invested with the plenary and exclusive powers conferred by these statutes. Gen. Sts. c. 48, §§ 1–3. St. 1869, c. 111. Pub. Sts. c. 50, § 1. St. 1892, c. 402. *Allen* v. *Boston*, 159 Mass. 324, 336. *Bowditch* v. *Boston*, 168 Mass. 239. *Weed* v. *Boston*, 172 Mass. 28. *Gray* v. *Aldermen of Boston*, 139 Mass. 328.

But a radical change followed upon the enactment of St. 1897, c. 426, §§ 2, 3, 7. The board of street commissioners, which had been established by the St. of 1870, c. 337, and given the powers then exercised by the board of aldermen in the laying out and discontinuance of streets and ways, were thereafter to have full authority to order the construction of all public sewers, and to assess betterments, even if under the St. of 1891, c. 323, §§ 8, 10,

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when ordering the location, laying out and construction of highways in accordance with the plans of a board of survey created by that statute, authority to include "the laying out of a trunk sewer . . . as engineering demands shall require" seems to have been granted. *Warren* v. *Street Commissioners*, 181 Mass. 6, 7. See also St. 1894, c. 416, §§ 2, 3; St. 1902, c. 521; St. 1906, c. 393, § 9.

It may be that in the absence of definitive legislative revision and consolidation of the great number of special acts governing the construction of public ways and sewers in the city, and relating to the authority of the officers charged with the supervision of the various municipal departments, there are seemingly inconsistent or contradictory expressions, when the attempt is made to construe them for the purpose of formulating a comprehensive and clear system of municipal administration. See Sts. 1885, c. 266; 1890, c. 418; 1891, c. 323; 1892, c. 402; 1894, c. 416, §§ 2, 3; 1895, c. 449, § 23; 1896, c. 204; 1897, c. 426; 1899, c. 450, § 3; 1902, c. 521; 1903, c. 268; 1906, c. 393. *Ryan* v. *Boston*, 204 Mass. 456. *Commercial Wharf Co.* v. *Boston*, 194 Mass. 460; *S. C.* 208 Mass. 482. Yet, the intention of the Legislature as expressed in the St. of 1897, c. 426, being unambiguous, the board of street commissioners were invested with the powers formerly exercised by the aldermen, and after the passage of this act a public sewer could not be ordered or built except upon their adjudication with the approval of the mayor. The commissioners under § 2, and not the mayor are first to decide whether a sewer shall be located and constructed, and if the approval of the mayor follows, then upon completion, the just and equitable charges for construction are to be assessed by the commissioners upon all estates specially benefited, while if he does not approve, their order is inoperative. Nor did the amendatory act of 1903, c. 268, which the plaintiff contends supports the validity of the assessment, abridge their authority. It is only after his approval, and the sewer is to be built, that the mayor under St. 1897, c. 426, § 4, as amended by St. 1903, c. 268, § 1, is to designate the superintendent of streets or such other officer as he may select to enter upon the work of construction. But whoever is designated he is to carry out and execute the order of the board of commissioners. St. 1897, c. 426, § 4. St. 1903, § 268, § 2. Although before the

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work is begun the officer thus chosen must record in the registry of deeds for the county, a statement approved by the mayor of his intention to construct the sewer, naming the street or describing the land where it is to be constructed, with his estimate of the cost, this provision only becomes applicable when the commissioners, with the mayor's approval, have decided, that the sewer shall be built.

The construction of a sewer in the street upon which the land now owned by the plaintiff abutted having been undertaken by the mayor and superintendent of sewers without any adjudication or order of the commissioners, was unlawful and the subsequent assessment of betterments cannot cure the omission. The right to assess, and if necessary to collect by sale of the property a betterment tax, depended upon a strict compliance with the statute. *Abbott* v. *Frost*, 185 Mass. 398. *Draper* v. *Mayor of Fall River*, 185 Mass. 142. *Commercial Wharf Co.* v. *Boston*, 208 Mass. 482. And as the jurisdictional powers of the board could not be delegated their assessment did not operate as a ratification of acts originally invalid. *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 381, 382. *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 462. *Commercial Wharf Co.* v. *Boston*, 208 Mass. 482.

The covenant against incumbrances not having been broken when the deed of the defendants was delivered, the plaintiff has no cause of action. *O'Connell* v. *First Parish in Malden*, 204 Mass. 118. The exceptions therefore must be sustained, and under the St. of 1909, c. 236, judgment is to be entered for the defendants.

So ordered.

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LILLIAN R. CARNEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 5, 6, 1912. — May 25, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Street Railway. Elevated Railway. Negligence, Res ipsa loquitur.

In an action against a corporation operating by electricity a surface railway and also an elevated railway, it appeared that the plaintiff, when travelling as a passenger in an open surface car of the defendant beneath the defendant's elevated structure on which a train was passing, looked up and was struck in the eye by a spark, which could have been found to have been a minute piece of hot iron that fell from the elevated road and was assumed to have been thrown off by the action of the contact shoe of the passing train. *Held*, that on these facts alone, without any evidence that the defendant ought to have foreseen this danger or that there was any practicable method of guarding against the emission of sparks or of preventing their falling to the street which the defendant had failed to adopt, there was no evidence of negligence on the part of the defendant.

SHELDON, J. The plaintiff was injured while she was riding in an open surface car beneath the defendant's elevated structure. She heard the rumble of an elevated train over her car, "saw the sparks flying," looked up and was struck in the eye by a spark, which could be found to have been a minute piece of hot iron, about as large as the point of a pin, coming from the elevated road, and, as we assume, from the contact shoe of the train which was passing thereon. The structure was properly in the street and the defendant was authorized to operate its road by electricity. There was no evidence that it was a frequent occurrence for sparks to fall from its passing trains into the street, or indeed that this had ever before happened. There was nothing to indicate that the defendant ought to have foreseen this danger and to have guarded against it or given warning of its existence. There was no evidence that there was any practicable method or device for checking the emission of sparks from its trains or its electrical apparatus, or preventing their fall to the street, which the defendant had failed to adopt. There was nothing to show any lack of proper care on the part of the defendant in the operation of its trains or cars.

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Under these circumstances it is manifest that the cases of *Woodall* v. *Boston Elevated Railway*, 192 Mass. 308, and *Walsh* v. *Boston Elevated Railway*, 192 Mass. 423, cannot help the plaintiff. The ground on which those cases were decided, that there was evidence of an existing danger and of negligence on the part of the defendant in not providing an appliance to prevent the falling of sparks into the street, and in not applying to the railroad commissioners for the approval of a plan to accomplish that object, is lacking here. Either she has chosen, or the facts of the case have compelled her, to rest her claim simply upon the ground that she has been injured by a spark falling on her eye and that this spark came from a train of the defendant lawfully operated upon its elevated railroad.

She contends accordingly that these facts present a case for the application of the doctrine *res ipsa loquitur*, — that negligence of the defendant may be inferred from the bare fact that she has been injured in the manner stated. It is true no doubt that the cause of her injury could be found to have come from the operation of apparatus which had been furnished and applied by the defendant and was wholly under its management and control. *McDonough* v. *Boston Elevated Railway*, 208 Mass. 436. *Le Barron* v. *East Boston Ferry Co.* 11 Allen, 312, 317. *Miller* v. *Ocean Steamship Co.* 118 N. Y. 199. *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435. *Scott* v. *London Dock Co.* 3 H. & C. 596. *Kearney* v. *London, Brighton & South Coast Railway*, L. R. 5 Q. B. 411. But this single circumstance is not always enough. Where as here the cause of the accident has come from the lawful operation by lawful means of an authorized instrumentality, and where any damage or injury that has resulted may have come without any negligence of the defendant, but may have arisen merely as an unavoidable accident from the careful and skilful exercise of its lawful rights in spite of the observance of all proper precautions, there no liability can arise without some affirmative evidence of negligence. In such a case the happening of the accident with the resulting injury is as likely to have come without the fault of the defendant as to have been due to its negligence, and the presumption of fact upon which the doctrine *res ipsa loquitur* is based does not arise; the inference of negligence cannot be drawn without some evidence to support it. *Beattie* v. *Boston Elevated Railway*,

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201 Mass. 3, 6. *Minihan* v. *Boston Elevated Railway*, 197 Mass. 367, 373. *Thomas* v. *Boston Elevated Railway*, 193 Mass. 438. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572, 574. *Clare* v. *New York & New England Railroad*, 167 Mass. 39. *Graham* v. *Badger*, 164 Mass. 42, 47. For this reason we recently have held that in the absence of a statutory liability a railroad company is not liable, without evidence of negligence on its part, for damage done by fire caused by sparks from its locomotive engines. *Wallace* v. *New York, New Haven, & Hartford Railroad*, 208 Mass. 16.

For the same reasons, in two cases closely resembling that which is here presented, it was held that no inference of negligence could be drawn from the happening of the accident, and the plaintiff was not allowed to recover. *Searles* v. *Manhattan Railway*, 101 N. Y. 661. *Wiedmer* v. *New York Elevated Railroad*, 114 N. Y. 462. In the last cited case, the court said that the evidence disclosed a single colorless fact, the emission of a coal smaller than a pinhead, and that the rule *res ipsa loquitur* had not been extended far enough to authorize from this fact an inference of actionable negligence.

It is perfectly consistent with the evidence that the defendant has taken all the precautions that were suggested in *Woodall* v. *Boston Elevated Railway*, 192 Mass. 308, or which since have been discovered to be possible. If so, it has not been guilty of negligence. It follows that the judge* at the trial acted rightly in ordering a verdict in its favor.

Exceptions overruled.

W. J. Miller, for the plaintiff.

E. P. Saltonstall, for the defendant.

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* *Jenney*, J.

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CHARLES E. MAIN *vs.* COUNTY COMMISSIONERS OF PLYMOUTH.

Suffolk. March 6, 7, 1912. — May 25, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Way, Public: relocation, layout. *County Commissioners. Certiorari.*

A petition by residents of two adjoining counties to the county commissioners of one of the counties, representing that a certain "town road" in that county "as also" a certain "ancient way . . . is crooked, narrow and with limits undefined," and petitioning the board "to lay out a county highway over the route aforesaid, except that we petition that a new layout be established" at a certain point "as public necessity and common convenience would seem to require," contains as to the two ways described a single averment and a single prayer; and the county commissioners have no jurisdiction to divide the prayer of the petitioner, relocating under R. L. c. 48, § 12, the way described as the "town road" and laying out under § 1 the way described as an "ancient way."

Action to be taken by county commissioners under R. L. c 48, § 1, which provides for the laying out of a new highway from town to town or from place to place within the same town, or for the alteration or discontinuance of an existing highway, is fundamentally different from that to be taken under § 12 of that chapter, which provides for the relocation of a way within a town.

A petition to a board of county commissioners contained a single prayer asking them "to lay out a county highway over the route" of a town way and of a way called an "ancient way." The board in dealing with the petition acted outside of their jurisdiction in laying out a highway under R. L. c. 48, § 1, over the course of the alleged "ancient way" and relocating the town way under § 12 of the statute. The whole course of their proceedings with regard to the petition indicated that they regarded the two ways as designed to be used together and to serve one main purpose in common. It did not appear that the commissioners would have dealt as they did with either way if they had recognized their lack of power to act under § 1 as to one way and under § 12 as to the other. The owner of land through which the alleged "ancient way" passed petitioned for a writ of certiorari quashing the proceedings. In granting the writ, it was *held* that the entire proceedings of the commissioners should be quashed because their error went to the root of their action.

PETITION, filed in the Supreme Judicial Court on May 9, 1911, and afterwards amended, for a writ of certiorari to quash the action of the respondents in regard to the following petition:

"Respectfully represent the undersigned residents of Plymouth and Bristol Counties that the town road leading from a point on the State Road near the Keyes Memorial Chapel in South Wareham via Fearing's Hill and Blackmore Pond to its junction with the

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Plymouth to Sippecan county road near the residence of Jerome Dean, as also the ancient way, from a point near the dwelling of Nathaniel White to Barlow's Landing on the Weweantit river, is crooked, narrow and with limits undefined: we therefore petition your Honorable Board to lay out a county highway over the route aforesaid, except that we petition that a new layout be established at the Ox Bow Bend near the farmhouse of Dr. Maurice H. Richardson as public necessity and common convenience would seem to require, and mark by stone bounds the limits of Barlow's Landing."

The petitioner owned land through which the alleged "ancient way" passed. The proceedings of the respondents in regard to the petition are described in the opinion.

The case was reserved by *Morton*, J., upon the petition, the answer and a sketch agreed upon by the parties, for determination by the full court.

E. V. Grabill, for the petitioner.

H. W. Brown, (*C. S. Davis* with him,) for the respondents.

SHELDON, J. As the county commissioners do not appear to have granted the prayers of the petition "that a new layout be established at the Ox Bow Bend near the farmhouse of Dr. Maurice H. Richardson," and to "mark by stone bounds the limits of Barlow's Landing," we need not consider the nature or effect of either of these prayers. The rest of the petition represented that two ways therein mentioned, one called a town way and the other an ancient way, were crooked and narrow and had undefined limits; and asked the commissioners "to lay out a county highway over the route aforesaid." In effect the petition recited the existence of two public ways, and prayed that a county highway be laid out over the route of these two ways. The county commissioners made a decree which, after a somewhat incorrect recital of the petition, adjudged that common convenience and necessity required that the prayer of the petition be granted. At the hearing which followed this adjudication the commissioners ruled that the petition called for action under § 12 and not under § 1 of R. L. c. 48, that is, that it asked for the relocation of two existing ways and not for the laying out of a new way or for the alteration or discontinuance of any existing ways. Evidence was thereupon introduced which tended to show, and upon which the commissioners

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apparently were convinced, that the "ancient way" described in the petition as running to Barlow's Landing, had no existence as a public way and so could not be relocated by the commissioners under § 12 already referred to. The hearing then was closed and the matter of the petition was taken under advisement. About two months later, on December 24, 1910, the commissioners, after notice to the counsel who had appeared before them, held another meeting, and there stated that they had determined that the portion of the petition concerning the "ancient way" should be dealt with as a petition under § 1 for the laying out of a new way. Other proceedings took place which need not be stated. They made a decree on April 18, 1911, by which they first widened and straightened the town way named in the petition and in fact relocated it, proceeding under the authority of R. L. c. 48, § 12, and then proceeded to lay out a new highway to Barlow's Landing, substantially, as we understand, over the course of the alleged ancient way.

It will be seen that the commissioners undertook to divide the single prayer of the petition into two parts, a prayer for the relocation or alteration of the existing town way, and a prayer for the laying out of a new way over the general course of the alleged ancient way, which apparently was not a public way at all and certainly had not been found to be such. In this they exceeded their authority.

We do not deem it necessary to determine whether the petition should have been treated as brought under § 1 or § 12 of the statute already referred to. The commissioners ruled, apparently without objection from any one, that it was brought under the latter section, and the hearing proceeded and evidence was put in under that ruling. No doubt there are difficulties that would have to be considered if the correctness of this ruling had been contested before us. The petition was inartificially drawn, and its scope and effect presented a fair question for discussion. See *Stockwell* v. *Fitchburg*, 110 Mass. 305, 309; *Livermore* v. *County of Norfolk*, 186 Mass. 133, and 189 Mass. 326; *Bennett* v. *Wellesley*, 189 Mass. 308; *Holbrook* v. *Douglas*, 200 Mass. 94. But as to the two alleged ways mentioned therein, upon which the county commissioners were asked to act, the averment was single, that each was "crooked, narrow and with limits undefined," and the prayer was a single one, for the laying out of a county highway over the route thereof.

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It did not ask for different action as to the different ways. This court early decided that an application for the alteration of an existing way did not authorize the laying out of a wholly new way. *Commonwealth* v. *Cambridge*, 7 Mass. 158. For whatever action this petition may be regarded as asking, it follows that two different and inconsistent courses could not be grounded upon the one prayer made therein.

It is settled that the action to be taken under these two respective sections is fundamentally different. This is recognized in both the opinions in *Bennett* v. *Wellesley*, 189 Mass. 308, though perhaps most clearly stated in the dissenting opinion of Knowlton, C. J., in language which as to this point was not the subject of disagreement: "If a petition plainly calls for an alteration, within the meaning of § 1, the commissioners have no jurisdiction to act upon it under § 12; and if it plainly calls for a relocation, within the meaning of § 12, they have no jurisdiction to proceed under § 1." But here the commissioners have undertaken to do even more than what was thus said to be beyond their power. They have not merely treated a petition brought under one section (no matter which one) as brought under the other, but have treated a single averment and a single prayer as made partly under one and partly under the other section. And see *Tufts* v. *Somerville*, 122 Mass. 273, as quoted and commented on in *Watertown* v. *County Commissioners*, 176 Mass. 22, 27.

It has been very ingeniously argued by the counsel for the respondents that as we have decided that action upon more than one way can be asked for in a single petition (*Yeamans* v. *County Commissioners*, 16 Gray, 36), it well may be that one sort of action may be asked for as to one way and a different action as to another way; *Goodwin* v. *Marblehead*, 1 Allen, 37; *Pembroke* v. *County Commissioners*, 12 Cush. 351; and it is suggested that it would be only a short step further to hold that the same form of allegation and prayer may justify different kinds of action as to different ways. But we are clearly of opinion that upon a specific prayer for one and the same action to be taken upon different ways, where the prayer gives jurisdiction for the adoption of only one course, two different and inconsistent courses of action cannot be taken as to two different ways, which are both the subject of that one prayer.

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The error of the commissioners goes to the root of their action. It does not appear that they would have dealt as they have with either of these subject matters if they had recognized their lack of power to do both of the different things which they attempted to do. The whole course of the proceedings indicates that they regarded the two ways which they sought to define and to establish as designed to be used together and to serve one main purpose in common. Indeed there has been hardly a suggestion to the contrary. In our opinion the proceedings must be quashed. The other objections which have been taken to the proceedings need not be considered.

Certiorari to issue.

WILLIAM B. WRIGHT *vs.* FRANK A. ANDREWS COMPANY, Incorporated.

Suffolk. March 13, 1912. — May 25, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Conversion. Sale. Tender.

At the trial of an action for the alleged conversion of a diamond ring, there was evidence tending to show that the plaintiff purchased a particular diamond of the defendant with whom he left it to be set in a ring for the entire price of $500, of which he paid $100 at the time of the purchase, that the stone was set in the ring to the plaintiff's satisfaction and acceptance, and that the defendant then retained possession of the ring until the plaintiff should make full payment; that about five months later the plaintiff wrote to the defendant offering to rescind the purchase and to take back what he had paid and that the defendant did not accept the offer; that after a further interval of nearly five months the plaintiff tendered to the defendant $400 and demanded the ring and the defendant answered merely that he did not have the ring but that he could get it. There was no evidence of any agreement with regard to the payment of interest. *Held*, that the evidence warranted findings that the contract of sale never had been rescinded, that any lien that the defendant had upon the ring had been ended by the plaintiff's tender, and that the defendant had converted the ring.

TORT OR CONTRACT, the first count being in tort for the conversion of a diamond ring, and the second, after amendment, for a breach of a contract in failing to deliver such a ring. Writ dated July 30, 1908.

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In the Superior Court the case was tried before *Hitchcock*, J. Facts which the jury were warranted in finding are stated in the opinion. The date of the purchase of the diamond therein referred to was October 11, 1907. The plaintiff's offer to rescind was by a letter dated March 6, 1908. The plaintiff's tender of $400 and demand for the ring was on July 30, 1908.

At the close of the evidence the defendant asked for the following rulings, which were refused:

"1. If the contract between the plaintiff and the defendant for the purchase of the ring was executory and if something remained to be done by the defendant before delivering it to the plaintiff, no title to the ring passed from the defendant to the plaintiff and the plaintiff cannot maintain an action for conversion."

"8. If at the time of the demand upon the defendant by the plaintiff for the delivery of the ring, the ring was not then in the possession of the defendant, the refusal of the defendant to deliver the ring would not constitute conversion."

"11. Upon all the evidence the plaintiff is not entitled to recover."

The jury found for the defendant on the second count, and on the first count for the plaintiff. The defendant alleged exceptions.

J. C. Johnston, for the defendant.

J. E. Kelley, for the plaintiff.

SHELDON, J. The jury could find that the plaintiff purchased a particular diamond of the defendant, the title to which at once passed to the plaintiff, but that he left it with the defendant to be set in a ring, for the whole price of $500, of which he paid down the sum of $100. They also could find that the stone was set in the ring to his satisfaction and acceptance, and that the defendant then retained it until he should make full payment therefor. The plaintiff, as it could be found, could not then pay the residue of the price, and after a considerable delay made an offer to the defendant to rescind the purchase and take back what he had paid; but the defendant did not accept this offer. After still further delay the plaintiff tendered the balance due to the defendant and demanded the ring, and the defendant merely answered that it did not then have the ring but could get it. By the tender, any lien which the defendant had upon the ring was ended, and the

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plaintiff was entitled to immediate possession thereof, as could be found, but the defendant refused to give it to him. If so, he was entitled to maintain an action for its conversion. *Gilmore* v. *Newton*, 9 Allen, 171. *Milliken* v. *Hathaway*, 148 Mass. 69. The jury need not believe the defendant's testimony that it was not then in possession of the ring.

Nor were the jury bound to find that the defendant had rescinded its contract with the plaintiff for his delay in making full payment, even if it could have done so. It never had returned or offered to return the payment which the plaintiff had made; nor, as could have been found, had it availed itself of any one of the remedies which his default left open to it. See *Putnam* v. *Glidden*, 159 Mass. 47, 49, and cases cited. It may be assumed that it had a vendor's lien for the unpaid purchase money. *Arnold* v. *Delano*, 4 Cush. 33, 38. *Norfolk Hardwood Co.* v. *New York Central & Hudson River Railroad*, 202 Mass. 160. But this was perfectly consistent with, and indeed presupposed, a general right of property in the plaintiff, and would be ended by the plaintiff's tender. Nor was the tender invalid because it did not include interest which was not shown to have been due.

Accordingly a verdict for the defendant could not have been ordered.

The defendant's first request for instructions could not have been given without adding the qualification that the rule there stated would not be applicable if it appeared (as there was some evidence tending to show) that the parties intended the title to pass to the plaintiff either at once or upon the setting of the stone, and that this had been done before the plaintiff's tender. *Riddle* v. *Varnum*, 20 Pick. 280. *Sherwin* v. *Mudge*, 127 Mass. 547. *Wesoloski* v. *Wysoski*, 186 Mass. 495. *Automatic Time Table Advertising Co.* v. *Automatic Time Table Co.* 208 Mass. 252.

The eighth request contained a correct statement of the law so far as it went. *Johnson* v. *Couillard*, 4 Allen, 446. But it ought not to have been given without leaving it also to the jury to say whether before the demand and refusal the defendant had parted with or converted the ring, or otherwise by its merely wrongful act had disabled itself from delivering it to the plaintiff (*Gilmore* v. *Newton*, 9 Allen, 171; *Milliken* v. *Hathaway*, 148 Mass. 69), or whether the ring, even if not in the immediate possession of the

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defendant, was yet not within its full control, as the statement of its president testified to by the plaintiff indicated.

The instructions given on the question of liability are not reported, and must be taken to have been full and accurate.

The defendant's other exceptions either have been expressly waived, or have not been argued and must be treated as waived.

Exceptions overruled.

CARMELA MARANA *vs.* MICHAEL McDONOUGH.

Suffolk. March 14, 1912. — May 25, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, Causing death.

At the trial of an action under R. L. c. 106, § 73, by the widow of an employee of the defendant to recover for the employee's death, there was evidence tending to show that at the time of his death the plaintiff's husband was a common laborer employed under a foreman who was subject to the orders of one who on behalf of the defendant was in charge of certain rock blasting operations, that in the course of the blasting of rock the foreman placed an ignition battery too near the place of explosion, which caused a piece of rock to strike and kill the plaintiff's husband, that the defendant had furnished to the foreman sufficient wire to keep the battery placed at a safe distance from the explosion, that the wire at first used on the battery was two hundred feet in length, but that, after being used several times, it had become shortened, by being melted by the explosions and by being cut by rocks, to less than one hundred feet in length at the time of the accident. *Held*, that there was evidence of negligence of the foreman who could have been found to have been a superintendent of the defendant, that the risk of such negligence was not assumed by the plaintiff's husband, and that it could not be said as matter of law that he was not exercising due care in relying on the skill and judgment of his superior whose orders he was bound to obey.

TORT by the widow of one Michael Marana to recover under R. L. c. 106, § 73, for his death which was alleged to have occurred from his being struck by a rock thrown in blasting while he was in the employ of the defendant, who was building a street railway, and to have been caused by negligence of a superintendent of the defendant in placing an ignition battery too near to the place of explosion. Writ dated April 24, 1907.

In the Superior Court the case was tried before *Brown*, J. The

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facts favorable to the plaintiff which the jury would have been warranted in finding are stated in the opinion. The witness Seretto was an expert who testified for the plaintiff. There was evidence that Connolly was the superintendent of the entire contract which the defendant was performing, and that Rotondo was a foreman over the plaintiff's husband and others.

At the close of the evidence the judge ordered a verdict for the defendant, and, the plaintiff excepting, reported the case for determination by this court, judgment to be entered on the verdict if the verdict was ordered properly, and otherwise judgment to be entered for the plaintiff in the sum of $1,000.

W. P. Murray, for the plaintiff.

J. A. Lowell, (*J. Lowell* with him,) for the defendant.

SHELDON, J. The plaintiff's husband was killed in consequence of being hit by a piece of stone thrown from a blast in a ledge of rock. This was a characteristic danger of his employment; and if nothing more appeared it would have to be held that he had assumed the risk of what happened, and that no action could be maintained therefor against his employer. *Chisholm* v. *New England Telephone & Telegraph Co.* 176 Mass. 125, 127, 128.

But while the evidence was conflicting and certainly would have warranted findings favorable to the defendant's contentions, it yet could have been found that the accident was due to the negligence of the defendant's superintendent in placing the battery which was to set off the charge too near the hole in which the charge had been put. Apparently sufficient wire had been provided to allow the battery to be placed at a safe distance from the charges which were to be exploded; but it could be found that by reason of the melting of the end of the wire, or its being cut by sharp edges of rock, the wire became shorter as it was used in successive explosions. When this accident happened, as could be found, the wire had been shortened in this way from more than two hundred to less than one hundred feet in length, which brought the battery so much nearer the place of the explosion and thus increased the danger from flying stones. Other wire was at hand, and the shortened wire need not have been used. Even without the testimony of Seretto, it could be found that the superintendent was negligent in using so short a wire and thereby exposing Marana to greater injury. The risk of such negligence of a superintendent,

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though merely increasing a risk of the employment, is not assumed by a servant. *Malcolm* v. *Fuller*, 152 Mass. 160. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 536.

While there was evidence that Marana was himself a skilled blaster, fully able to appreciate the increased risk to which he was exposed by the altered position of the battery, there was also evidence that he was merely a common laborer, who might have been justified in relying on the skill and judgment of his superior whose orders he was bound to obey. It cannot be said as matter of law that he was not in the exercise of due care, whatever the weight of the evidence may seem to us to have been.

There was evidence that both Rotondo and Connolly were superintendents within the meaning of R. L. c. 106, §§ 71, 73; St. 1909, c. 514, §§ 127, 129.

The issues should have been submitted to the jury; and under the terms of the report judgment must be entered for the plaintiff in the sum of $1,000.

So ordered.

MEURLE H. ALLEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 14, 1912. — May 25, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Evidence, Competency, Medical books and opinions. *Witness*, Cross-examination. *Practice, Civil*, Exceptions, Conduct of trial, New trial. *Actionable Tort.*

Neither medical books, although of recognized authority, nor the opinions of medical experts, unless testified to by themselves as witnesses, can be received as evidence.

At the trial of an action of tort against a street railway company for personal injuries alleged to have been caused by a collision of cars, a medical expert testifying for the defendant cannot be asked in cross-examination whether he is familiar with any authorities which say that a certain disease, with which the plaintiff contends that he is suffering as a result of the accident, might come as the result of a blow, nor can he be asked questions about books written by persons other than himself.

At the trial of an action for personal injuries, where material issues were, whether the plaintiff had suffered any damage as alleged by him, and, if so, how much, the plaintiff's counsel improperly was allowed, against repeated objection and

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exception by the defendant, in cross-examination of a medical expert called by the defendant to make inquiries regarding medical text books by medical writers other than the witness, the plaintiff's counsel framing his questions from such a medical treatise and displaying several medical books upon his table. The objectionable cross-examination filled more than five pages of the printed record. In his charge to the jury the judge instructed them, with emphasis and elaboration, not to consider the opinions expressed by the authors of the medical books, the context of the charge showing that he meant only that they were not to consider such opinions as bearing upon the medical questions raised in the case; but he did not strike out the incompetent evidence and the jury were left at liberty to consider such opinions as differing from those of the defendant's medical expert and so bearing upon the weight of his testimony. *Held*, that the defendant's exceptions should be sustained, since even after the charge the error remained prejudicial to the defendant.

Where, at the trial of an action of tort for personal injuries resulting from alleged negligence of the defendant in which the defendant does not admit that the plaintiff has been damaged, the trial judge commits error in the admission of incompetent evidence which is prejudicial to the defendant on the question of damages, a new trial should be ordered on all the issues of the case, since the plaintiff's right to recover at all depends upon whether he has suffered any damage.

TORT for personal injuries alleged to have been received by reason of a collision of trains of the defendant in the subway in Boston on October 28, 1905. Writ dated May 2, 1908.

In the Superior Court the case was tried before *Dubuque*, J. Material facts are stated in the opinion. The jury found for the plaintiff in the sum of $2,500; and the defendant alleged exceptions, which related only to certain portions of the cross-examination of Dr. Henry C. Baldwin, a medical expect who testified for the defendant.

J. E. Hannigan, for the defendant.

J. P. Walsh, for the plaintiff.

SHELDON, J. It hardly has been contended that the cross-examination of Dr. Baldwin was proper. The evidence thus obtained was plainly incompetent. It comes under the settled rule that neither medical books, though of recognized authority, nor the opinions of medical experts unless testified to by themselves as witnesses, can be received as evidence. *Ashworth* v. *Kittridge*, 12 Cush. 193. *Commonwealth* v. *Wilson*, 1 Gray, 337. *Washburn* v. *Cuddihy*, 8 Gray, 430. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 139. *Commonwealth* v. *Brown*, 121 Mass. 69, 81. *Commonwealth* v. *Jordan*, 207 Mass. 259, 271. That cross-examination was directed mainly to showing what the opinions of other medi-

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cal authorities were as to the effect of the plaintiff's alleged injuries in causing the disease called diabetes mellitus. Upon the defendant's first objection to a reference to a book written by Dr. Davenport, the judge expressly ruled that the witness might be asked whether certain authorities did not express certain views and if that did not change his opinion, although the judge said also that the jury were not to consider what was said in Dr. Davenport's book. The defendant did not then except, and the cross-examination proceeded upon the same line. Finally the plaintiff's counsel asked whether the witness was familiar with any authorities which said that diabetes mellitus might come as the result of a blow, and the defendant now saved an exception (which afterwards was renewed) to this line of examination. The witness was asked also about books by one Naunyn and one Forscheimer, the questions being framed from a medical book written in German, which the counsel held in his hand. The whole effect of the cross-examination was to impress upon the minds of the jurors the idea that certain writers were men of eminence in medicine, whose opinions were of value, and that their opinions differed from the opinion to which the witness had testified. A course somewhat similar was attempted in *Commonwealth* v. *Jordan*, 207 Mass. 259, 271. There it was a material question whether a cut on the neck of a deceased person was made before or after death, the defendant claiming that it was made after death and that this was shown by the fact of an inverted edge. A medical witness testified for the Commonwealth that in his opinion it might have been made before death. He then was asked on cross-examination whether if a certain named professor in a medical school said that the inverted edge was evidence of a cut after death, that would change the witness's opinion. It was held that this question was rightly excluded, because it "would if allowed to be answered have placed before the jury in an indirect manner" the opinion of that professor. But in the case at bar the judge exactly reversed the rule which thus had been laid down.

The plaintiff contends that this error was cured by the fact that the judge, beside saying what already has been quoted, instructed the jury in his charge that they must not consider upon medical questions the opinions expressed by the authors of medical books, but only those stated by the physicians who had testified.

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The admission of incompetent evidence is no ground for a new trial if before the case is given to the jury they are instructed to disregard it, and if there is no reason to apprehend that it finally did prejudice their minds. It will be presumed that they followed the instructions given to them and did not allow their minds to be affected by the evidence which had been withdrawn from their consideration. *Selkirk* v. *Cobb*, 13 Gray, 313. *Batchelder* v. *Batchelder*, 2 Allen, 105. *Whitney* v. *Bayley*, 4 Allen, 173. *Smith* v. *Whitman*, 6 Allen, 562. *Commonwealth* v. *Cunningham*, 104 Mass. 545. *Costello* v. *Crowell*, 133 Mass. 352, 355. *Anthony* v. *Travis*, 143 Mass. 58, 60. *Commonwealth* v. *Ham*, 150 Mass. 122, 124. *Commonwealth* v. *Thompson*, 159 Mass. 56, 59. *Clark* v. *Boston & Maine Railroad*, 164 Mass. 434, 439. *Commonwealth* v. *Cody*, 165 Mass. 133. *O'Brien* v. *Keefe*, 175 Mass. 274, 279. But this rule is not to be applied if it appears that real damage has been done to the excepting party or that the incompetent evidence was not sufficiently withdrawn from possible consideration by the jury. This was stated in many of the cases already referred to as well as in others. *Farnum* v. *Farnum*, 13 Gray, 508. *Commonwealth* v. *Edgerly*, 10 Allen, 184. *Commonwealth* v. *Keenan*, 152 Mass. 9. *Todd* v. *Boston Elevated Railway*, 208 Mass. 505, 506. *Lang* v. *Boston Elevated Railway*, 211 Mass. 492.

In the present case the objectionable cross-examination, against the repeated objection and exception of the defendant, was continued so that as reported it covers more than five pages of the exceptions. Similar questions were put in different forms as to different treatises, ending with general questions calling for and eliciting answers as to any text books that might agree with the claim of the plaintiff, and accompanied by the display of several medical books on the table of the counsel. As in *Kaler* v. *Builders' Mutual Fire Ins. Co.* 120 Mass. 333, 335, "the effect, and as may reasonably be supposed the purpose," of counsel were to bring before the jury the opinions of others who were, it was suggested, persons skilled in such matters, and to lessen the weight of the witness's testimony by showing that their views were different from his. His testimony was not affected and the desired object was not attained unless this effect was produced by use of the incompetent means allowed to be resorted to. We should hesitate to say that even a broad instruction to the jury to disregard wholly

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the evidence thus obtained would have cured the injury which had been caused to the defendant.

But no such instruction was given. The incompetent evidence was not stricken out, and the jury were not told to disregard it. They were merely instructed, with emphasis and elaboration it is true, not to consider the opinions expressed by the authors of medical books; and the context abundantly shows that this meant only that they were not to consider such opinions as bearing upon the medical questions raised in the case. All the evidence remained before them, and they were left at full liberty to consider these opinions as differing from those of Dr. Baldwin and so bearing upon the weight of his testimony. As in *Commonwealth* v. *Edgerly*, 10 Allen, 184, there was an inconsistency in the rulings, even as finally stated, and it cannot be said that the error in the admission of the evidence was cured.

The effect of this error may have been more than merely to affect the amount of the plaintiff's damages. Her right to recover at all depended upon the proof that she really had suffered injury. *Sullivan* v. *Old Colony Street Railway*, 200 Mass. 303. The error may have prejudiced the defendant upon this question. In our opinion justice requires that there should be a new trial of the whole case; and the order must be

Exceptions sustained.

FRANK H. CRAIG *vs.* JOHN J. LANE.

Suffolk. March 25, 1912. — May 25, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Performance and breach.

A Maine shipper of potatoes sold to a Boston dealer three car loads of potatoes. A "car load" according to the custom of the trade meant as many bushels as would about fill such a car as the shipper chose to load, the exact number of bushels being named in an invoice. After shipment of three carloads of potatoes, the shipper in accordance with another custom of the trade made out three drafts each covering the purchase price, less the freight, of the potatoes which he felt satisfied were in one of the cars, attached the bills of lading to the respective drafts and sent the drafts to Boston for collection. The purchaser paid

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one draft and received and resold the potatoes in the car corresponding to that draft. Discovering that that car contained fifty-nine bushels less than it should have contained according to the invoice, the purchaser refused to pay the other drafts or to accept the other car loads of potatoes. The shipper brought an action for the purchase price of the other two car loads. The purchaser contended that the action could not be maintained because of the shortage in the first car. *Held*, that the action might be maintained, the contract being entire and at no time having become severed, and rescission being impossible because the defendant had resold the potatoes in one car.

CONTRACT for the balance of the purchase price of three car loads of potatoes alleged to have been sold to the defendant by the plaintiff. Writ in the Municipal Court of the City of Boston dated March 24, 1908.

On appeal to the Superior Court, the case was tried before *Bell*, J. There was evidence tending to show that the plaintiff, a shipper of potatoes in Maine, through a produce broker in Boston sold to the defendant three car loads of potatoes at a certain price, and that in the potato trade a "car load" meant as many bushels as would about fill such a car as the shipper chose to load, the exact number being named in an invoice; that in accordance with a custom in the potato business in Boston, the plaintiff, having loaded and shipped to the defendant the three car loads of potatoes, drew separate drafts upon the defendant for the contract price, less the freight, of the number of bushels of potatoes which he was satisfied each car contained, and attached to the draft the bill of lading of that car; that the defendant paid one draft and received and resold the carload it related to; and afterward, contending that the car which that draft covered contained fifty-nine bushels less than the plaintiff's invoice stated, five hundred and fifty bushels, refused to accept the potatoes in the other cars or to pay the other drafts until the alleged shortage could be adjusted.

At the close of the evidence the defendant asked for the following ruling:

"If the jury finds as a matter of fact on all the evidence in this case, that the defendant entered into a contract with the plaintiff for the purchase of three cars of potatoes at ninety cents per bushel to be delivered in Boston with the number of bushels in each car as stated by the plaintiff, and the cars were delivered in Boston, and if the jury further finds that bills of lading were in the bank,

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with drafts attached, drawn for the full value of the cars according to the number of bushels stated by the plaintiff, and if the jury further finds that the defendant took up one of these drafts on a car containing five hundred and fifty bushels with draft drawn for the value of the car, and if the jury further finds on all the facts in this case that there was a shortage of fifty-nine bushels, or thereabouts, then the plaintiff has failed to carry out his contract, and the defendant is not obliged to take the other two cars."

The ruling was refused. The jury found for the plaintiff in the sum of $334.14; and the defendant alleged exceptions.

The case was submitted on briefs.

W. F. Kimball, for the defendant.

J. Cavanagh & C. H. Walker, for the plaintiff.

SHELDON, J. We see no ground on which the exceptions can be sustained. The ruling asked for by the defendant could not have been given; and that is the only question presented.

The defendant's contract was an entire one for the purchase of three cars of potatoes; and it was not severed by the fact that the plaintiff shipped them at different times and drew a separate draft for the alleged contents of each car at the agreed price. We assume without deciding that upon discovering the shortage which he claimed in the load of the first car he might have declined to accept it and rescinded his contract. But he chose not to do this. Instead of doing so he accepted that car load and sold it to a customer of his own, thus putting it beyond his power to return it to the plaintiff. He could not then rescind the contract by reason of the shortage. He must seek his remedy under the contract by way of set-off or recoupment, or by an independent action. *Morse* v. *Brackett*, 98 Mass. 205. *Mansfield* v. *Trigg*, 113 Mass. 350. *Barrie* v. *Earle*, 143 Mass. 1. *Obery* v. *Lander*, 179 Mass. 125, 130. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476.

Exceptions overruled.

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MASSACHUSETTS BAPTIST MISSIONARY SOCIETY, trustee, *vs.* BOWDOIN SQUARE BAPTIST SOCIETY & another.

Suffolk. February 27, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, & DECOURCY, JJ.

Religious Society. Equity Jurisdiction, To establish rights of pew owner. *Words,* "Connected with."

Discussion by RUGG, C. J., of the rights of the owners of pews in houses of worship belonging to religious societies in this Commonwealth.

The owner of sixty-five pews out of a total number of one hundred and seventy-five in a church building belonging to a religious society incorporated under the laws of this Commonwealth, who by the by-laws of the society has only one vote as a member of the corporation, has proprietary rights in the church building corresponding to the number of his pews.

By R. L. c. 36, § 54, "any religious society connected with a church" incorporated under the provisions of that chapter may authorize a conveyance of "any real or personal property belonging to it to such church, and such estate shall thereafter be held by the church subject to the same uses and trusts as when held by said religious society." Under a vote passed in the manner directed by this section a Baptist religious society, incorporated in 1841 under a general law, owning a church building conveyed such building to a Baptist church incorporated in 1911 under R. L. c. 36. This church had been organized as an unincorporated ecclesiastical body in 1887 and for more than twenty years had worshipped in the church building belonging to the religious society and continued to worship there after its incorporation and the conveyance of the building to it. By the by-laws of the religious society one vote was given to each pew owner. In a suit in equity by the owner of sixty-five pews, who had voted against the conveyance, to enjoin the recording of the deed and compel a reconveyance, and also to establish the plaintiff's property rights, it was *held,* that the religious society, of which the plaintiff was a member, was "connected with" the church to which the conveyance was made within the meaning of the statute, that under the conveyance the church held the estate "subject to the same uses and trusts as when held by said religious society," and that the plaintiff's beneficial property rights in the building as a pew owner had not been extinguished; that the plaintiff's right to vote, which he had lost by the conveyance, was not a property right incidental to pew ownership but had existed under the by-laws of the society and had been terminated by the operation of the statute, to which his membership was subject; therefore, that the only relief to which the plaintiff was entitled was a decree establishing his property rights as a pew owner in the church building transferred to the incorporated church.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 19, 1911, by the Massachusetts Baptist Missionary Society, trustee under the will of Asa Wilbur, as the holder of sixty-five

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out of one hundred and seventy-five pews in the church of the Bowdoin Square Baptist Society, to enjoin the recording of a deed dated June 23, 1911, from that society to the Tabernacle Baptist Church and for a reconveyance, and also for a determination of the rights of the plaintiff in the property of the Bowdoin Square Baptist Society under the will of Asa Wilbur.

The case came on to be heard before *DeCourcy*, J., who reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

The plaintiff was incorporated in 1808 under the name the Baptist Missionary Society in Massachusetts; in 1835 its name was changed to the Massachusetts Baptist Convention and in 1904 its name again was changed to the Massachusetts Baptist Missionary Society, all by special acts of the Legislature. Asa Wilbur died in 1878. His will contained the following paragraphs:

"I give and bequeath unto the Massachusetts Baptist Convention a legal corporation according to the Statutes of this Commonwealth, all my pews and interest in the House of Worship and all appurtenances thereto belonging owned by the Bowdoin Baptist Society in trust however as hereafter shown. And I hereby appoint the said Massachusetts Baptist Convention my Trustee for the purposes herein described namely:

"The Bowdoin Square Baptist Church and Society now worshipping in said house to have the free use and control of the said pews and property as they now have so long as the said church shall continue a religious ecclesiastical body holding the doctrines and sentiments in its articles of faith and worship in said house. But if said church should be disbanded or for any cause nonexistent or be merged into or be united with another church to worship in another place or the said house of worship be sold, then the said trustee shall hold the funds received for said trust property for the following purposes, namely:

"First, to assist in building Baptist meeting houses.

"Second, to assist in paying the debts contracted in building Baptist meeting houses prior to the probate of this will and still existing when the house is already built. . . ."

Asa Wilbur at the time of his death was the owner of sixty-four pews in the meeting house. The plaintiff thereafter acquired one

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other pew under the will of one Storey. The other necessary facts are stated in the opinion.

The case was submitted on briefs.

E. B. Gibbs, for the plaintiff.

O. E. Dunham, for the defendants.

RUGG, C. J. The Bowdoin Square Baptist Society was incorporated as a religious society in 1841 under general law. It acquired title to land and a church building. The deed to it was absolute in form without statement of any trust. The estate appears to have been paid for by donations and the sale of pews, and in part by a mortgage upon it. In 1840 the Bowdoin Square Baptist Church was organized as an ecclesiastical body, and continued to occupy the church owned by the society until 1885. Soon after this time it passed out of existence. In 1887 the Tabernacle Baptist Church was organized, and since then it has occupied the church building of the society. It was incorporated in 1911 under R. L. c. 36, §§ 47–54. The plaintiff is the owner of sixty-five pews out of a total number of one hundred and seventy-five. Under the by-laws of the society, each pew owner was deemed a proprietor in the corporation, but was not entitled to more than one vote. In June, 1911, a legal meeting of the society was held, at which the plaintiff was represented, and at which it was voted by fifteen affirmative against two negative votes to sell and convey the society's real estate to the Tabernacle Baptist Church, then recently incorporated. At this meeting seventeen pew holders were present representing eighty-one pews, of which sixty-five belonged to the plaintiff. It voted against the transfer, and protested against the action taken. It brings this bill to set aside the conveyance executed in accordance with the vote.

The nature of the right of a pew holder, as between himself and the corporation owning the building, under our system of church ownership, has been discussed in several cases and is well settled. The right to a pew, though formerly real estate (St. 1795, c. 53, § 1) is now personal property (St. 1855, c. 122, R. L. c. 36, § 38), and has been such in Boston for more than a century. (St. 1798, c. 42.) "It is property of a peculiar nature, derivative and dependent. It is an exclusive right to occupy a particular portion of a house of public worship, under certain restrictions. The owner of a pew is not a tenant in common of the estate on

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which the house stands; the legal estate is in the corporation, if the religious society be one, or in the trustees, if the property be vested in them to the use of the congregation, forming a religious society for public worship. Whoever else, therefore, may be, or claim to be, *cestuis que trust*, the holders of pews are clearly entitled to stand in that relation." *Attorney General* v. *Federal Street Meeting House*, 3 Gray, 1, 45, 47. The building may be abandoned, repaired, altered, or taken down by the legal owner, to whose determination in this respect the pew owner must submit. If, however, the building is taken down, when fit for occupancy, or the pew destroyed in the process of alteration or repair, and this merely on the ground of expediency, there must be indemnity paid to the pew owner. If the building is abandoned, not wantonly or unreasonably or with intent to injure the pew holders, or if it falls into decay and becomes unfit for occupancy, the pew owner is without remedy. *Fassett* v. *First Parish in Boylston*, 19 Pick. 361. *Aylward* v. *O'Brien*, 160 Mass. 118, 127. *Daniel* v. *Wood*, 1 Pick. 102. *Gay* v. *Baker*, 17 Mass. 435. *In re New South Meeting-House*, 13 Allen, 497, 517. *Howard* v. *First Parish in North Bridgewater*, 7 Pick. 138. *Gorton* v. *Hadsell*, 9 Cush. 508. *Wentworth* v. *First Parish in Canton*, 3 Pick. 344. R. L. c. 36, §§ 33, 34. But although the rights of the pew holder are thus qualified, subsidiary and dependent, they are by no means shadowy or insubstantial. "The pew owner cannot be despoiled of his property. In some respects his rights are superior to those of the parish." *Kimball* v. *Second Congregational Parish in Rowley*, 24 Pick. 347, 349. *Revere* v. *Gannett*, 1 Pick. 169. His privileges cannot be wantonly destroyed nor his title extinguished simply from motives of utility. The position of pew owner was a dual one in the society now under consideration. By virtue of ownership of a pew, he was a member of the corporation, and entitled to vote, his right being restricted to a single vote, no matter how many pews he might own. In this respect he is bound by the rule of the requisite majority. But he was also the owner of the property of the pew. In this respect his right depended upon the number of pews owned, and he might exercise all the proprietary rights attaching to such ownership. This kind of ownership, to the extent that it is property, is entitled to all the protection which more tangible estates are given under the law.

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It is not necessary to inquire what would be the rights of the plaintiff in the event of a sale of the church building and the land connected with it for commercial purposes, nor to examine into the question whether the society had or the Tabernacle Baptist Church has a right to make such a sale without devoting the proceeds to the erection of a new house of worship devoted to like purposes as the present one, nor to determine whether these matters are not covered by previous decisions. It has been held that the majority of a corporation cannot sell church property and divide it among the members against the protest of a minority. The power of the court to authorize a sale for such a purpose is doubtful, and certainly would not be exercised except in an extraordinary case. *In re New South Meeting House in Boston*, 13 Allen, 497. *Old South Society* v. *Crocker*, 119 Mass. 1, 27. *Warner* v. *Bowdoin Square Baptist Society*, 148 Mass. 400, 405. *Canadian Religious Association* v. *Parmenter*, 180 Mass. 415, 423. These questions are not presented in the present case.

The society by its establishment and acceptance of the real estate bought and built upon by contributions for the purpose of enabling it and its successors to hold it "as a church in fee simple forever" (to quote from the agreement of subscribers) was charged with the duty of "maintaining public worship and religious instruction." *Parker* v. *May*, 5 Cush. 336, 345. The act of the society in voting to sell and in conveying the building to the Tabernacle Baptist Church was authorized by law in performance of this duty. By R. L. c. 36, § 54, "Any religious society connected with a church so incorporated may, at any meeting called for the purpose, by a three-fourths vote, authorize one or more persons in its name and behalf to convey any real or personal estate belonging to it to such church, and such estate shall thereafter be held by the church subject to the same uses and trusts as when held by said religious society." We construe the words "connected with" to mean belonging to the same denomination or faith and professing the same doctrines or creed and having such relations with the church occupying the edifice belonging to it as existed in similar cases according to the usages and customs of the denomination to which they belonged. In the present case the church and society both belonged to the Baptist denomination. Of the one hundred and twenty members composing the Tabernacle

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Baptist Church when it was organized seventy-two belonged to the original Bowdoin Square Baptist Church, and the Tabernacle Church since its organization more than twenty years ago has worshipped in the meeting-house belonging to the society, and is regularly worshipping there now. It seems plain that the society is connected with the Tabernacle Church within the meaning of the statute, and hence was empowered by this statute "to convey any real or personal estate belonging to it to" the church. *Baker* v. *Fales*, 16 Mass. 487, 504. *Stebbins* v. *Jennings*, 10 Pick. 172. *Weld* v. *May*, 9 Cush. 181. R. L. c. 36, § 54, first enacted by St. 1887, c. 404, § 8, was passed under the power reserved to the Legislature of altering the corporate powers of a religious corporation by St. 1840, c. 62, § 2, under which the society was incorporated. The authority to make such conveyance, however, was limited in R. L. c. 36, § 54, by the requirement that the "estate shall thereafter be held by the church subject to the same uses and trusts as when held by said religious society." Such an authority to convey contemplates no radical change in the use and management of the property, which has been dedicated to religious uses. It enables those interested to assimilate the temporal and religious concerns of the body into a single legal entity which comprises those who are members of the church. It affords an opportunity to embrace a form of corporate existence, rendering impossible the friction which, according to experience, sometimes arose between those composing the incorporated religious society vested with the legal title to property and those individuals associated voluntarily as a church, celebrating Christian ordinances, and cherishing a particular form of ecclesiastical polity and religious creed, each connected with and dependent upon the other. But the statute does not purport to authorize the wiping out of property rights beneficiary in character. These are expressly preserved and are as binding upon the new corporation as upon the old. The duty of maintaining public worship and religious instruction in the building rests as heavily upon the present owner as it did upon its predecessor in title. The interest of the pew holders is of a peculiar kind, and partakes of the nature of both proprietary and beneficiary rights. As has been pointed out, they have a qualified usufructory right to occupy under certain restrictions, and the religious corporation as to the maintenance of these beneficial

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rights occupies a position analogous to that of trustee. *Sohier* v. *Trinity Church*, 109 Mass. 1, 20. *Attorney General* v. *Proprietors Federal Street Meeting House*, 3 Gray, 1, 45.

The church building has not been diverted from the uses to which it was dedicated. It is still a place for worship for Christians of the Baptist persuasion. The society has not undertaken to do more than divest itself of the legal title and put it in the hands of another corporation with like powers. But it has not put an end to the implied trusts for which the building was established. It has turned the real estate over to another corporation as authorized by law. These circumstances do not affect the rights of the pew holder. There is nothing in the record to indicate that the easement of the plaintiff in the use of its pews has been interrupted or in any way interfered with. The building is still devoted to the same religious uses as before. The right of the pew holder was at the first and since has been to occupy his pew at times of worship. That right remains. The beneficiary property rights of the plaintiff in the building and its privileges in the enjoyment of them have not been extinguished. *Small* v. *Cahoon*, 207 Mass. 359, 364. *Kellogg* v. *Dickinson*, 18 Vt. 266, 276. The only substantial change wrought is that ownership of pews no longer constitutes membership in the corporation owning the building with a right to vote. That circumstance is no inherent characteristic of pew ownership. It arose out of a by-law of the society, and ceased with the proprietorship of the society.

It follows, notwithstanding certain allegations of the bill and admissions in the answers as to conclusions of law, that upon these facts the rights of the plaintiff as owner of the pews under trusts established by the will of Asa Wilbur have not been affected by the transfer of title from the society to the Tabernacle Baptist Church. It left undisturbed the proprietary rights of pew owners. So far as such ownership gave the pew owners a voice in the corporate management of the owner of the building, that has come to an end because it was subject to the regulations imposed by the by-law of the society and the supervisory power of the Legislature. But participation in such management is not a property right of the same nature as that of ownership of the pew. They are separable in their essence, flow from different sources, and have no necessary connection with each other. As member of an artificial

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organization created under a statute and governed in accordance with by-laws, the pew holder is subject to the rules by which he obtained such membership. As the owner of property, he is protected by the Constitution. Hence the plaintiff shows ground for equitable relief. A decree may be entered establishing its rights in accordance with this opinion.

So ordered.

UNION TRUST COMPANY *vs.* WILLIAM H. McGINTY.

Suffolk. March 5, 1912. — May 27, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Bills and Notes.

Under R. L. c. 73, §§ 46, 136, 137, if the holder of a negotiable promissory note, knowing that it was made for the accommodation of the payee who indorsed it to the holder, by agreement with such indorser for a valuable consideration extends the time of payment without the consent or knowledge of the accommodation maker, this does not discharge such maker from liability on the note.

CONTRACT on a promissory note for $250 dated October 13, 1902, signed by the defendant as maker, payable two months after date to one James J. McCluskey, indorsed by McCluskey and discounted by the plaintiff at his request. Writ in the Municipal Court of the City of Boston dated October 6, 1908.

On appeal to the Superior Court the case was tried before *Bell*, J. There was evidence that the note was made by the defendant solely for McCluskey's accommodation, that at the maturity of the note on December 13, 1902, the plaintiff received from McCluskey a payment of $10 as interest to February 13, 1903, and that in consideration of this payment without the defendant's knowledge or consent the plaintiff extended the time of payment of the note until the last named date. It was agreed that the defendant had introduced evidence which would warrant the jury in finding that the plaintiff when the note was discounted knew through its president that the defendant had executed the note solely for McCluskey's accommodation and that McCluskey had not given the defendant any consideration therefor.

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The judge ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

F. W. Johnson, for the defendant.

C. A. Warren, for the plaintiff.

RUGG, C. J. The single question presented in this case is whether the accommodation maker of a promissory note is discharged, if the holder, knowing that the note was made for the accommodation of the payee and indorser, by agreement with the indorser upon a valuable consideration, without the maker's consent, extends the time of payment.

Before the enactment of the negotiable instruments act (St. 1898, c. 533, R. L. c. 73, §§ 18–212) one who made a promissory note for the accommodation of another was as between the parties a surety. The holder, who had knowledge of the true relation of the parties, was bound to act toward such accommodation maker as toward a surety in order to preserve his rights against him. Under such circumstances an extension of time to the person ultimately liable, without the consent of the surety, that is the accommodation maker, released the latter. *Guild* v. *Butler*, 127 Mass. 386, and cases cited at 389. *Jennings* v. *Moore*, 189 Mass. 197. The precise point is whether this rule of law has been changed by the negotiable instruments act.

It is matter of common knowledge that the negotiable instruments act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the legislatures of the several States and by the Congress of the United States. The design was to obliterate State lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several States, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded into uniformity. This act in substance has been adopted by many States. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficent design of the Legislature in passing an act for the promotion of harmony upon an impor-

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tant branch of the law. Simplicity and clearness are ends especially to be sought. The language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had theretofore been the law of this Commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different States.

Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. §§ 77, 208. The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time of making that the maker was an accommodation maker. § 46. The act further provides in definite terms that the instrument and hence one primarily liable is discharged in one of five different ways (§ 136), that is, by payment by the principal debtor, or by the party accommodated, by cancellation, by any other act which would discharge a simple contract, and by the principal debtor becoming the owner at or after maturity. There is no mention here of a discharge of an accommodation party by extension of time. But among the ways in which a party secondarily liable may be discharged is (§ 137) an agreement by the holder to extend the time of payment or to postpone his right to enforce the instrument "unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Whatever force might attach to the enumeration of ways in which the instrument and consequently parties primarily

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liable might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration and its inclusion among the ways in which persons secondarily liable may be discharged, is almost irresistible that the Legislature did not intend that persons primarily liable should be discharged in that manner. These two sections standing side by side, both dealing with the subject of discharge of liabilities of parties, the one mentioning, the other not mentioning, extension of time by the holder as a means of working discharge of liability, cannot be treated as accidental or without significance. It is strong proof of a legislative purpose to change the pre-existing law of the Commonwealth. These considerations outweigh the argument adduced from the fact that the "instrument" rather than "parties primarily liable" is the language used in § 136 and from the phrase of cl. 4, to the effect that the instrument may be discharged "by any other act which will discharge a simple contract." The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though as between such party and the accommodation maker a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and so far as the holder is concerned to establish liability to him upon a firm basis, not easily shaken by parol evidence.

There is nothing inconsistent with this conclusion in *Enterprise Brewing Co.* v. *Canning*, 210 Mass. 285. The contention of the defendants there discussed concerned a relation of principal and surety between the payee and guarantor in an action between the two.

This appears to be the view taken without exception by the courts of other jurisdictions which have considered the point. In the interpretation of a statute widely adopted by the States to the end of securing uniformity in a department of commercial law, we should be inclined to give great weight to harmonious decisions of courts of other States, even if we were less clear than we are in this instance as to the soundness of our own conclusion. *Vanderford* v. *Farmers' Bank*, 105 Md. 164. *Cellers* v. *Meacham*, 49 Ore. 186. *Wolstenholme* v. *Smith*, 34 Utah, 300. *Bradley*

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Engineering & Manuf. Co. v. *Heyburn*, 56 Wash. 628. *National Citizens' Bank* v. *Toplitz*, 81 App. Div. (N. Y.) 593. Affirmed on another ground 178 N. Y. 464. *Richards* v. *Market Exchange Bank*, 81 Ohio St. 348. *Fritts* v. *Kirchdorfer*, 136 Ky. 643, 650.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM H. CRAPO.

Suffolk. March 11, 1912. — May 27, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Criminal, Appeal, Motion to withdraw plea of guilty.

An appeal to the Superior Court by a defendant in a criminal case who pleaded guilty in the court below does not entitle such defendant to a trial unless he is permitted by the appellate court to withdraw his plea of guilty.

Upon a motion of the defendant in a criminal case for leave to withdraw a plea of guilty the judge may refuse to receive as evidence an affidavit of the defendant if he declines to testify or to offer other evidence in support of his motion.

COMPLAINT in the Municipal Court of the City of Boston charging the defendant with assault and battery with sulphuric acid upon two persons named, at Boston on June 4, 1911.

In the municipal court the defendant pleaded guilty and on June 7, 1911, was sentenced to pay a fine of $100. The defendant appealed to the Superior Court. The appeal was entered on July 3, 1911, and on the same day the defendant filed a motion for leave to withdraw his plea of guilty and to enter a plea of not guilty. The motion was accompanied by affidavits of the defendant and of his counsel. On July 10, 1911, the defendant filed a claim for a trial by jury. On October 30, 1911, the defendant's motion for leave to withdraw his plea of guilty was denied by *Sanderson*, J., who filed a memorandum of his decision as follows: "The defendant, in response to a statement of the court that the court was ready to hear testimony in support of his motion, if he had any to offer, stated that he would not call any witness, but that he would rely entirely upon the affidavit annexed to the motion. This motion is denied."

The defendant appealed from the order denying the motion.

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W. O. Childs, for the defendant.

A. C. Webber, for the Commonwealth.

BRALEY, J. By his plea of guilty when first arraigned in the municipal court the defendant admitted the substantive allegations of the complaint, and while his appeal to the Superior Court after conviction vacated the judgment, it did not change the issue, which had been joined, or entitled him to a jury trial, and on the record nothing remained to be done except to impose sentence. *Commonwealth* v. *Mahoney*, 115 Mass. 151. *Commonwealth* v. *Ingersoll*, 145 Mass. 381, 382.

The appellate court, however, upon the defendant's application, which seems to have been made seasonably, could permit him to withdraw the plea below, and plead anew, if satisfied that his admission of guilt was not voluntary and intentional, but resulted from inadvertence. *Commonwealth* v. *Winton*, 108 Mass. 485. It was incumbent on the defendant, if required, to offer evidence to support the request; but at the hearing, and in response to a statement by the presiding judge that the court would hear testimony if he had any to offer, the defendant stated that he would rely entirely upon the affidavit annexed to the motion. The memorandum and order denying the motion are equivocal. It is not certain whether the denial rested on the ground that the affidavit could not be received as evidence, or whether its recitals were rejected because the judge did not believe them to be true. But while the affidavit is sufficient in form and substance, yet, if treated as testimony, the credibility of the affiant and the truth or falsity of the statements were questions of fact upon which the decision of the judge is final. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89. *Deane* v. *American Glue Co.* 200 Mass. 459, 464.

The objection to evidence resting only on *ex parte* affidavits, when application is made to the court for permission to withdraw an incriminating plea, is that the means of knowledge, or the truth of the intermediate facts on which the general conclusions are founded, cannot be ascertained. The affiant, especially if he is an interested party, can mould the evidentiary statements in conformity with the exigencies of the case. At the hearing the defendant's guilt or innocence was not in issue, and he could have testified as a witness in his own behalf without being compelled

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to give evidence which could be used against him at the trial of the complaint. R. L. c. 175, § 20. By his resorting to a statement in writing, even if made under oath, the court was not required to receive in evidence the affidavit, and whichever way was taken no error of law appears. *Walsh* v. *Rogers*, 13 How. 283. *Baldwin* v. *Flagg*, 14 Vroom, 495. Wigmore on Ev. §§ 1384, 1708. See also R. L. c. 175, § 45.

Order affirmed.

LAURA THOMPSON *vs.* CITY OF BOSTON.

Suffolk. March 14, 1912. — May 27, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Way, Public: defect in highway. *Municipal Corporations.*

An excavation on private land adjoining the sidewalk of a highway of a city, "cut right down square or nearly so from the edge of the sidewalk" to the depth of from three to three and one half feet, may be found to have made the use of the sidewalk so unsafe for travellers as to require the maintenance of a railing, for an injury caused by the want of which the city is liable under R. L. c. 51, § 18.

TORT under R. L. c. 51, § 18, for personal injuries alleged to have been sustained for want of a sufficient railing by falling into an unguarded excavation on private land adjoining the granolithic sidewalk of Draper Street, a highway of the defendant, on which the plaintiff was walking. Writ dated July 17, 1908.

In the Superior Court the case was tried before *Wait*, J. The material evidence is described in the opinion. No question was raised in regard to the due care of the plaintiff. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

L. S. Thierry, for the plaintiff.

J. A. Campbell, for the defendant.

BRALEY, J. By R. L. c. 51, § 18, if for want of a sufficient railing or barrier in or upon a public way a traveller in the exercise of due care is injured, the city, town or county charged with the duty of maintaining the way is liable in damages if the defect

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might have been remedied by reasonable diligence. No rigid standard of measurement by which the liability can be adjusted in all cases is practicable for reasons pointed out in *Warner* v. *Holyoke*, 112 Mass. 362, and restated and amplified in *Scannal* v. *Cambridge*, 163 Mass. 91, 93. The question whether the place into which the traveller passes is so dangerous, and in such proximity to the way as to render its use unsafe being largely dependent upon the circumstances of each case, is ordinarily for the jury. *Warner* v. *Holyoke*, 112 Mass. 362, 367. The danger, however, "must be of an unusual character, such as . . . declivities, excavations, steep banks, or deep water." *Damon* v. *Boston*, 149 Mass. 147, 151. *Shea* v. *Whitman*, 197 Mass. 374, 375. It appears in the present case, that a parcel of land contiguous to the street over the sidewalk of which the plaintiff was walking had been excavated by blasting out rock for a distance of one hundred feet, or about two-thirds of the length of the lot adjoining the street, and the removal of the rock resulted in lowering the surface to an appreciable depth below the level of the sidewalk. A witness for the plaintiff testified, that the rock "was cut right down and close as they could cut it, right down square or nearly so from the edge of the sidewalk" and "the rock had been removed to a depth of three to three and one half feet below the sidewalk." The length, depth and character of this excavation, with its close proximity to the way could have been found by the jury to have rendered the use of the sidewalk unsafe for pedestrians, and if the particular part of the cavity into which the plaintiff fell when she stepped just over the line of the sidewalk of itself might not have required the defendant to provide a railing, the entire place disclosed dangerous conditions within the meaning of the statute. *Alger* v. *Lowell*, 3 Allen, 402. *Murphy* v. *Gloucester*, 105 Mass. 470, 472. *Commonwealth* v. *Wilmington*, 105 Mass. 599, 601. The right of the defendant to put up and maintain a railing sufficient for the ordinary exigencies of travel upon this portion of the street, even if the entrance of an abutter might have been obstructed, is settled, and the question of the city's negligence should have been submitted to the jury under appropriate instructions. *Alger* v. *Lowell*, 3 Allen, 402. *Lyman* v. *Amherst*, 107 Mass. 339.

Exceptions sustained.

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HERBERT H. FREY *vs.* IVER JOHNSON SPORTING GOODS COMPANY.

Suffolk. March 14, 1912. — May 27, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Construction, Performance and breach. *Patent. Words*, "Improvement."

An inventor assigned to a purchaser "the full and exclusive right to" his invention as described in specifications which with an application for a patent he had filed with the United States commissioner of patents, and the purchaser in a contract in writing agreed that, "upon the final allowance of said patent" he would pay to the inventor $1,000. The contract contained no warranty as to the novelty of the invention described in the specifications, and no undertaking that the patent to be issued should be coextensive with the claims set forth in the application or that the whole invention was patentable. Following repeated rejections by the patent examiner, there were successive amendments filed with the commissioner of patents as to the inventor's claims of novelty and finally a patent was issued which, while not coextensive with the invention as originally claimed, covered all of the original claims which the patent office recognized as patentable. *Held*, that the contract meant that the $1,000 became due to the inventor upon the issuing of a patent covering the whole or any part of the claims, either as originally set out or, by implication, as subsequently amended.

At the trial of an action by an inventor against a purchaser of his invention for breach of a contract whereby the purchaser agreed to pay to the inventor a certain sum of money upon the issuance of a patent upon claims which at the time of the contract the inventor had filed with the United States commissioner of patents, or upon claims subsequently filed by way of amendment, if it appears that a patent finally was issued upon an amended claim which, while narrower than the claim originally filed, covered all of that claim which was patentable, and if there is no contention that the narrowing of the claim was due to fraud on the part of any one, evidence of admissions by the inventor that the patent which was issued did not include the important elements of his invention is immaterial.

Where an inventor sells and assigns to a purchaser "the full and exclusive right to" his invention as set out in a specification of claims filed with an application for a patent in the United States patent office, "together with all improvements which may be made thereon under the scope of said patent," he is not required to submit to the purchaser any improvement which he has thought of but has not worked out.

CONTRACT for the alleged breach of a contract in writing as to the sale of an invention for preventing vehicles from skidding, known as a "chain traction device." Writ dated May 14, 1909.

In the Superior Court the case was tried before *King*, J.

It appeared that on January 28, 1907, the plaintiff executed

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specifications preparatory to applying for United States letters patent upon his invention. On February 4, 1907, he sold, assigned and transferred to the defendant "the full and exclusive right to said invention as" set forth and described in the specifications "together with all improvements which may be made thereon under the scope of said patent," and authorized the commissioner of patents to issue the letters patent to the defendant. On the same day, as party of the first part, he made with the defendant as party of the second part the contract which is the subject of this action. The substance of the contract was as follows:

"Whereas the party of the first part has invented a certain new and useful improvement in anti-skidding devices known as a 'chain traction device' as set forth and described in the specifications prepared and executed by the party of the first part on or about the 28th day of January A. D. 1907 preparatory to obtaining letters patent of the United States therefor, and

"Whereas the party of the first part has this day assigned to the party of the second part all his interest to and in said invention, together with all improvements which may be made thereon under the scope of said patent,

"Now therefore in consideration of one dollar and other valuable considerations by each of the parties hereto, to the other paid, the receipt whereof is mutually acknowledged, it is further agreed as follows: —

"1. Upon the final allowance of said patent the party of the second part agrees to pay forthwith to the party of the first part the further sum of one thousand dollars in cash.

"2. The said party of the second part shall pay to the party of the first part the sum of three cents royalty upon each of said devices, as sold, up to and including two hundred thousand of said devices, when said royalty shall cease."

On February 1, 1907, the plaintiff by his attorneys had filed with the United States commissioner of patents an application for letters patent with specifications of three claims of novel inventions as follows:

"1. An anti-skidding attachment for wheels, comprising a member crossing the tire and a connected attaching device adapted to be maintained in its operative position by a spoke.

"2. An anti-skidding attachment comprising a member to cross

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the tire and a flexible attaching device adapted to be knotted about a spoke.

"3. An anti-skidding attachment, comprising a chain and a flexible attaching device engaging the chain and held in position by a spoke."

The claims were examined at the patent office and were rejected because of lack of novelty, patents previously having been issued to other persons covering the same inventions.

The plaintiff's attorneys then amended the application by cancelling the previous claims and substituting therefor as the claim, "an anti-skidding attachment for wheels comprising a tire crossing member, a flexible attaching member adapted to be knotted about a spoke and an end thereof removably connected to an end of the tire crossing member." This claim also was rejected and the plaintiff's attorneys cancelled it and substituted the following two claims:

"1. An anti-skidding attachment for wheels comprising a metallic tire crossing member, a flexible cord-like attaching member adapted to be wound and knotted about a spoke, and a hook secured to each end of the attaching member and removably connected to the adjacent end of the tire crossing member.

"2. An anti-skidding attachment for wheels comprising a flexible cord adapted to be wound and knotted about a spoke, a hook attached to each end of the cord and having an open, contracted throat, and a chain to cross the tire and adapted to be connected at its end with the hooks, the end-most links of the chain having a portion reduced in thickness to enter the contracted throats of the hooks."

The first of these claims was rejected and, finally, letters patent were issued on the second.

The defendant admitted the due execution of its contract with the plaintiff, the tender by the plaintiff to the defendant of the letters patent and that it had not paid the plaintiff the sum of $1,000 provided for in the agreement.

There was some evidence, admitted without objection, tending to show that the plaintiff had failed to submit to the defendant any improvements which he might make upon the patented device, and the judge ruled that that raised the only question for the jury. He therefore submitted to them the question,

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"Were any improvements on the device involved in this suit made by the plaintiff prior to the issuance of letters patent and not submitted to the defendant?" and upon that subject charged them in part, as follows:

"Are you satisfied from the evidence that any actual, physical improvement was made of the device which has been submitted before you? . . . If it was an improvement thought of by the plaintiff, but never in fact worked out, I charge you that he would not be under any obligation to convey that until he had worked out that improvement in some feasible shape. . . . Consider whether there is anything you can put your finger on in the evidence which warrants you in saying that any actual improvement was made — not thought of. And if any was made, what was it? And in what respect was it an improvement? And if any was made . . . is there any evidence that warrants you in finding that the plaintiff was not ready to give it to the defendant?"

The defendant asked for the following rulings:

"2. There is no evidence that the plaintiff has performed the special contract sued upon according to its terms."

"5. The plaintiff cannot recover on the evidence in this action for a breach of the contract sued upon.

"6. The verdict must be for the defendant.

"7. The plaintiff did not secure the final allowance of a patent which was in accordance with the specifications referred to in its declaration.

"8. The device described in the specifications referred to in the plaintiff's declaration differs materially from the device described in the patent as issued.

"9. The rejection of the plaintiff's three claims by the patent office conclusively determined that the matter contained in those claims is not covered by the patent as issued.

"10. The extent of a patent is determined by the matter set forth in the claims.

"11. Under a patent obtained on the specifications originally submitted by the plaintiff the defendant would have the right to prevent all other persons from maintaining such a device in operative position by means of a spoke; under the patent as granted the defendant has no such right.

"12. Under a patent obtained on the specifications originally

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submitted the defendant would have the right to prevent other persons using any flexible attaching device in connection with similar appliances; under the patent as granted the defendant has no such right."

"14. All parts of the device in evidence could be made freely by any other person without infringing on the plaintiff's rights except the hook with the contracted throat and the links in the chain reduced in thickness."

"16. Unless the patent as finally issued is the same as set out in the [original] specifications . . . the plaintiff cannot recover the $1,000 claimed.

"17. Unless the patent as finally issued is substantially the same as set out in the [original] specifications . . . the plaintiff cannot recover the $1,000 claimed."

The rulings were refused. The jury answered the question submitted to them in the negative and found for the plaintiff in the sum of $1,110. The defendant alleged exceptions.

C. H. Donahue, (*W. P. Meehan* with him,) for the defendant.

W. P. Murray, (*A. Hyman* with him,) for the plaintiff.

RUGG, C. J. This is an action for the breach of a written contract. The contract recited that the plaintiff had "invented a certain new and useful improvement in anti-skidding devices . . . as set forth and described in" certain specifications preparatory to obtaining letters patent. The defendant then agreed "upon the final allowance of said patent" to pay to the plaintiff $1,000. This action is to recover damages for breach of this agreement. An assignment of the invention from the plaintiff to the defendant was executed contemporaneously with the agreement. A patent was finally issued, which was not coextensive with the invention as claimed. Various claims of novelty made by the plaintiff were rejected by the patent office, but it is apparent from the evidence that the patent solicitors representing the plaintiff narrowed the claims from time to time only as they were disallowed by the officials of the patent office. It appears from the evidence that the patent as issued covered all of the original claims of the plaintiff which the patent office has recognized as patentable.

The first question presented is whether the ruling was correct to the effect that the proffer of the patent issued was a compliance by the plaintiff with his agreement. The contract of assignment,

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although describing the invention by reference and otherwise, contained no warranties as to its novelty. The assignment from the plaintiff to the defendant was of all his right, title and interest in and to the invention. The subject-matter of the contract is fully set out. It is the invention for which the plaintiff had filed an application for a patent. It was described at length in papers referred to in the agreement and was known to both parties. There was no concealment or misunderstanding about its nature. The contract contains no agreement, representation or undertaking on the part of the plaintiff that the patent to be issued shall be coextensive with the claims set forth in his specifications, nor that the whole invention is patentable. The substance of the agreement is that the invention, whatever its novelty may ultimately turn out to be, is assigned, and if any patent issues covering the whole or any part of the claims, as originally set out and by implication as subsequently amended, then the subsequent payment provided for shall be made. It follows that there was no question of fact upon this branch of the case. There being no stipulation as to the extent of patent which might issue, the contention of the defendant is unsound, to the effect that the question should have been submitted to the jury, whether the patent was substantially the same as that set out in the specifications.

The proffer of evidence of admissions by the plaintiff that the patent did not include the important elements of his invention was properly excluded, for it had no bearing upon the issue of law, which was the meaning of the contract, nor upon the issue of fact, which was as stated by the judge in his charge whether there had been a breach of contract on the part of the plaintiff such as prevented him from recovery. No contention was raised at the trial, either by the pleadings, requests for rulings or statements of claim by counsel, that the plaintiff by fraudulent collusion with others had caused the patent to be narrower than the invention as set forth in the specifications. Hence this point although faintly argued before us is not open. We do not intimate that the evidence excluded with its setting in the case would have been enough, even if this question had been seasonably presented.

By the contract the plaintiff assigned to the defendant any improvements which he might make within the scope of the patent. The question whether improvements had been made and not sub-

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mitted to the defendant as required by the contract was passed upon by the jury. The charge of the judge in this respect was not open to exception. In substance, it required the jury to be able to find some improvement made by the plaintiff and not turned over to the defendant. The distinction between a mere creature of the mind which would not constitute an improvement, and a thought worked into a feasible physical entity, which would constitute an improvement, was correct.

The defendant's requests for rulings were all properly refused. Some of them, to the effect that the plaintiff was not entitled to recover, manifestly could not have been given. However sound others of them may have been as abstract propositions of law, they were not applicable to the terms of the contract as we have interpreted it. It is not necessary to examine them in detail, because they were either inapplicable or unsound in law.

Exceptions overruled.

COUNCIL OF JEWISH WOMEN *vs.* BOSTON SECTION COUNCIL OF JEWISH WOMEN & others.

Suffolk. March 18, 19, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction. Corporation.

A foreign corporation cannot maintain a bill in equity against a Massachusetts corporation of which it is not a shareholder to enjoin it from carrying out a vote, passed at a special meeting of its members and within the scope of its chartered powers, merely because of irregularities and other defects in the meeting and the vote.

A New York corporation, organized as a national body for a philanthropic purpose which contemplated separate organizations in different localities having the same purpose and practically the same constitution and under a provision of their constitutions paying half of their membership fees to the national body, cannot maintain a suit in equity to enjoin a Massachusetts corporation, organized under R. L. c. 125 as a local organization of the national body, from carrying out a vote passed by its members at a special meeting to withdraw from the national body. If such vote and such proposed action are *ultra vires*, they should be remedied in appropriate proceedings instituted by the public authorities or by individual members of the Massachusetts corporation. So far as the acts of the Massachusetts corporation constitute a breach of contractual relations with the national body, the remedy is at law.

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A New York corporation, organized as a national body named a "council" for a philanthropic purpose, which contemplated separate organizations in different localities called "sections of the council" having the same purpose and practically the same constitution and under provisions of their constitutions paying one half of their membership fees to the national body and devoting contributions otherwise received to the purposes of the national body, cannot maintain a suit in equity to enjoin a Massachusetts corporation, organized under R. L. c. 125 with the corporate name "Boston Section of the Council," as such a section of the council from carrying out a vote to withdraw from the national body and from refusing further to pay one half of its membership fees to the plaintiff, and from expending other contributions independently of any action of the plaintiff, where the bill alleges merely that the defendant proposes to announce its severance from the plaintiff and to continue the use of its corporate name, and that it is the purpose of certain of the defendant's officers by holding themselves out as officers of the "Boston Council" "to obtain contributions and receive moneys intended to be devoted to the work of the" plaintiff, there being no allegation of a fraudulent intent on the part of the defendant or that it has received any money in trust for the plaintiff.

A New York corporation, organized as a national body called a "council" for a philanthropic purpose which contemplated separate organizations in different localities called "sections of the council," after it has permitted a Massachusetts corporation to be organized under R. L. c. 125 and to assume as its corporate name the "Boston Section of the Council," cannot maintain a bill in equity under R. L. c. 109, § 8, to enjoin the Massachusetts corporation from continuing the use of its corporate name after it has voted to withdraw from the national body.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 3, 1912, and later amended, in which, as amended, the plaintiff was the Council of Jewish Women, a New York corporation, and the defendants were the Boston Section Council of Jewish Women, a Massachusetts corporation organized under R. L. c. 125, (hereinafter called the defendant,) Esther M. Andrews, its president, and Rose L. Shellenberg, its treasurer.

The allegations of the bill were in substance as follows:

In 1893 an unincorporated association called the Council of Jewish Women was formed for the purpose of creating a closer fellowship and greater unity of thought and purpose through a widespread organization of Jewish women who should unite to carry on the purposes of the association throughout the United States. The plan of organization adopted and carried out was to form local sections of the Council of Jewish Women located in various cities and towns throughout the United States, which should be a part of the Council of Jewish Women. The various sections were to be governed by the constitution of the Council of Jewish Women,

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were to support it and were to carry out in co-operation its purposes. In 1909 this unincorporated association was organized as a corporation under the laws of New York, and is the plaintiff. The plaintiff caused to be organized the defendant Boston Section Council of Jewish Women, and in 1911 it was incorporated under the laws of Massachusetts.

The plaintiff adopted and promulgated a constitution, which provided for a single body having local parts or sections, and contained provisions that the local parts were required to recognize the constitution of the plaintiff and to accept and sign it; that the entire work of the local section consisted of the carrying out of the plans of the plaintiff; that one half of the dues paid by the local members should go to the plaintiff; and that a person by becoming a member of a section became a member of the plaintiff.

Attached to the constitution of the plaintiff was a form of constitution provided for the local sections, which the defendant adopted. This constitution contained provisions corresponding to those of the plaintiff. By its provisions, the defendant's members undertook to pay dues, of which one half should go to the plaintiff. The evidence of membership was a ticket furnished by the plaintiff. All the work of the local section was to be done under the supervision of the plaintiff. The officers of the defendant were required to remit one half of the dues to the plaintiff, and to do the various branches of its work under the plans provided by the plaintiff.

The defendant's constitution provided for amendments only in the following way: "Additions may be made to this Constitution according to the needs of the Section, provided they do not conflict with its provisions, and subject to the approval of the President and Executive Secretary of the Council. Such additions or amendments may be made at a general or special meeting by a two-thirds vote of the members present, provided notification of the proposed amendments shall have been given at the meeting immediately preceding, and shall have been sent to each member at least three days before action is to be taken."

The defendant adopted its name to signify to the public and to all persons dealing with it and with its officers and members that it was a part of the plaintiff and its name acquired that meaning throughout the United States. It in that way acquired a facility for doing the work of the organization and a prestige with all

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persons dealing with it which was due to the fact that it was a part of the plaintiff, and it in the same way obtained members who contributed to its financial support, and for the same reasons moneys have been subscribed to it.

The plaintiff would be greatly injured in its work and in its finances by the existence of any independent organization doing work under its name, or any similar name, and great confusion would result therefrom and moneys which would otherwise come to the plaintiff would be withheld or be diverted to other organizations, which would injure the plaintiff in its ability to carry out the purposes for which it was organized.

At a special meeting of the members of the defendant, informally called and inadequately attended, it was voted in terms "That the Boston Section Council of Jewish Women withdraw from the national body." The words "national body" referred to the plaintiff.

On information and belief it was alleged in the bill that the officers of the defendant proposed to announce that it had severed its connection with the plaintiff and to continue the use of its name and to receive moneys of members and contributions sent to it, and to expend all such moneys independently of any action by the plaintiff and to refrain from turning over to the plaintiff a portion of the membership fees belonging to the plaintiff under the terms of the constitution of the plaintiff and the defendant, and to keep such moneys and apply them to uses other than those provided by the constitution; that it was the purpose of certain of the officers of the defendant "to continue to represent that they were officers of the Boston Council of Jewish Women, and thereby to obtain contributions and receive moneys intended to be devoted to the work of the" plaintiff, and "to represent themselves in the educational, philanthropic, charitable, and religious work of Jewish women as the representatives of the" plaintiff.

The prayers of the bill were in substance that the defendant, its officers and agents be enjoined from using the name "Boston Section Council of Jewish Women," or any name so similar as to cause confusion, except as a description of a body which is a part of the plaintiff, and from carrying the above described vote into effect in any manner.

The defendants demurred. The demurrer was sustained by

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Braley, J., and a final decree was entered dismissing the bill. The plaintiff appealed.

E. F. McClennen, for the plaintiff.

Lee M. Friedman, (*P. Rubenstein* with him,) for the defendants.

SHELDON, J. The bill as amended is brought only by a New York corporation in its own right. Accordingly the case must be considered as if the action of the defendant corporation now complained of had been taken with the unanimous consent of all its members and with the observance of all due formalities. Of such merely corporate action, affecting only the conduct of the corporation within the scope of its chartered powers, other parties cannot complain on the ground of irregularities or other formal defects. *Beecher* v. *Marquette & Pacific Rolling Mill Co.*, 45 Mich. 103. *St. Louis Bank* v. *Grenada Bank*, 83 Miss. 610. *Central Trust Co.* v. *Condon*, 67 Fed. Rep. 84, 104. This leaves no ground for the maintenance of the bill.

The defendant is a Massachusetts corporation, deriving its franchises and privileges from the laws of this Commonwealth and under obligation to conform to those laws. It has not been incorporated also under the laws of any other State (see *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 198 Mass. 413, 417); it has no rights and is subject to no liabilities under the laws of any other State. It could not make itself permanently subordinate to any other authority. *Hill* v. *Rauhan Aarre*, 200 Mass. 438. *Saltman* v. *Nesson*, 201 Mass. 534, 541. *Thomas* v. *Railroad Co.* 101 U. S. 71, quoted in *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 269. *District Grand Lodge* v. *Jedidjah Lodge*, 65 Md. 236. *Lamphere* v. *Grand Lodge of United Workmen*, 47 Mich. 429.

If the defendant has gone beyond the scope of its corporate powers, the remedy must be found in action to be taken by the public authorities or by the individual members of the corporation according to the nature of the case. Any rights of the plaintiff against the defendant are of a contractual nature, and spring out of a voluntary relation, which can be altered or annulled at the will of either party, subject only to the ordinary remedies available against any one for a breach of contract or the violation of a duty. This is the principle of the decisions in somewhat similar cases. *McFadden* v. *Murphy*, 149 Mass. 341. *Kane* v. *Shields*, 167 Mass. 392. *Sabourin* v. *Lippe*, 195 Mass. 470. *Attorney General* v. *New*

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York, New Haven, & Hartford Railroad, 197 Mass. 194. *Rudolph* v. *Southern Beneficial League*, 23 Abb. New Cas. 199. *Kern* v. *Arbeiter Unterstuetzungs Verein*, 139 Mich. 233. It is the doctrine that runs through the cases from New Jersey that have been cited in argument. *Altmann* v. *Benz*, 12 C. E. Green, 331. *National Council of Jr. O. U. A. M.* v. *State Council of Jr. O. U. A. M.* 19 Dick. 470, and 21 Dick. 429. *State Council* v. *National Council*, 1 Buch. 433.

The averments of the bill do not show that the defendant has received any money in trust for the plaintiff within the rule stated in *National Council* v. *State Council*, 19 Dick. 470. Nor is any such fraudulent intention averred as was found to exist in *International Committee of Young Women's Christian Associations* v. *Young Women's Christian Association*, 194 Ill. 194.

The name of the defendant corporation appears to have been assumed without objection from any one. It is now too late to make such objection under R. L. c. 109, § 8, or under any other statutory provision which has been called to our attention. We cannot enjoin it from continuing to use that name.

The decree sustaining the demurrer and dismissing the bill with costs must be modified by adding the costs of the appeal, and so modified must be affirmed.

So ordered.

GEORGE E. KERR *vs.* JOHN W. CRANE & others.

Middlesex. March 21, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Trust, What constitutes, Validity, Enforcement. *Equity Jurisdiction. Fraternal Beneficiary Corporation.*

A member of a Massachusetts fraternal beneficiary corporation to whom it had issued a benefit certificate providing that in case of his death the benefit should be paid to a cousin, delivered the certificate to a friend, who came within none of the classes named in R. L. c. 119, § 6, or in the general laws of the corporation as entitled to benefits under such a certificate, and made an agreement, which was assented to in writing by the cousin who was named as beneficiary in the certificate and by the wife and nearest blood relations of the member, whereby

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the friend agreed to pay the member's assessments as they came due and to pay to the member a small sum monthly, and the beneficiary agreed that, on the death of the member, he would collect and hold the proceeds of the certificate for the friend's benefit. *Held*, that by the agreement and the delivery of the certificate a valid trust was created, and that after the death of the member the friend by a suit in equity might compel the beneficiary to carry it out.

Although a benefit cannot be paid by a Massachusetts fraternal beneficiary corporation to one who does not belong to any of the classes described in R. L. c. 119, § 6, and a beneficiary properly named in a certificate cannot make a valid assignment of his expectant interest to one who does not belong to any of those classes before the death of the member to whom the certificate was issued, the beneficiary may bind himself by the creation of a trust to collect and pay the benefit after the member's death to a person designated by the member to whom, for a valid consideration the member had delivered the certificate, although such person does not belong to any of the classes described in the statute; and after the member's death such person may enforce the trust by a suit in equity.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 23, 1910, and afterwards amended, in which it was alleged that the defendant New England Order of Protection, a Massachusetts fraternal beneficiary corporation, issued to one of its members, one Merritt B. Crane, a benefit certificate, that the defendant John W. Crane, a cousin of the member, was named the beneficiary therein under an agreement between him, Merritt B. Crane and the plaintiff, that he would pay the proceeds of the certificate after the death of Merritt B. Crane to the plaintiff. Merritt B. Crane having died and John W. Crane refusing to collect the amount due on the certificate and pay it to the plaintiff, the bill prayed that he should be compelled to do so.

The widow, a brother and the children of a deceased brother of Merritt B. Crane were allowed to intervene as defendants.

The case was heard by *Braley*, J., who filed a memorandum of his findings. The facts are stated in the opinion. A decree was entered for the plaintiff; and the defendants appealed.

G. A. A. Pevey, for the defendants.

J. W. Allen, for the plaintiff.

SHELDON, J. The findings made by the single justice were well warranted and cannot be reversed. The case must be decided upon those findings.

The benefit certificate taken by Merritt B. Crane in the defendant order could not have been made payable to the plaintiff, who came within none of the classes named in the statute or in the "general laws" of the order. R. L. c. 119, § 6. *Massachusetts*

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Foresters v. *Callahan*, 146 Mass. 393. *Marsh* v. *American Legion of Honor*, 149 Mass. 512. *Lavigne* v. *Ligue des Patriotes*, 178 Mass. 25. Nor could he acquire any rights in the certificate or its proceeds from any subsequent directions or assignment made in his favor by the insured, *Briggs* v. *Earl*, 139 Mass. 473, or by reason of the affectionate relations between himself and the member or by reason of his having paid assessments and dues for which the member was liable. *American Legion of Honor* v. *Perry*, 140 Mass. 580. *Skillings* v. *Massachusetts Benefit Association*, 146 Mass. 217. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314. *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289. *Clarke* v. *Schwarzenberg*, 162 Mass. 98, and 164 Mass. 347. *United Order of the Golden Cross* v. *Merrick*, 163 Mass. 374. *Clark* v. *Royal Arcanum*, 176 Mass. 468. *Hill* v. *American Legion of Honor*, 178 Mass. 145. *Wilber* v. *New England Order of Protection*, 192 Mass. 477. *Davis* v. *McGraw*, 206 Mass. 294. It is therefore the right and the duty of the defendant order to pay the amount of the certificate to the beneficiary named therein, the defendant John W. Crane.

The real claim of the plaintiff is against the last named defendant, upon the ground that a trust has been created in the plaintiff's favor and impressed upon the proceeds of the certificate, by which the beneficiary of the certificate is bound to receive and hold its proceeds for the benefit of the plaintiff and to turn them at once over to him. To create such a trust and to bind the beneficiary to the performance thereof, the insured member delivered the certificate to the plaintiff, and arranged that the latter should pay the assessments to become due thereon and also make a small monthly payment to the member himself. The member also informed the beneficiary John W. Crane of this his desire, of his arrangement with the plaintiff, and of his wish that John should pay the proceeds of the certificate, when collected, to the plaintiff. John orally assented to this. A written memorandum was also prepared and signed by the insured member, his wife and his nearest blood relations, and by John, the beneficiary. And the single justice has found that this beneficiary "understood that he was not to receive the proceeds for his own use," but that he "agreed to collect and hold the proceeds for the use of the plaintiff." Unless this arrangement and the trust which resulted there-

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from are invalid, or are not to be enforced by reason of the circumstances of the case, we are satisfied that it did create a duty on the part of John W. Crane to recognize the rights of the plaintiff as entitled to this fund when it should have been collected, and to pay the same at once to him, and that this right of the plaintiff can be enforced in equity. *Kendrick* v. *Ray*, 173 Mass. 305. *Hewins* v. *Baker*, 161 Mass. 320. Though not precisely the same, the situation is analogous to those cases in which one has acquired property "by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another. A trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of the promise he had induced the transfer of the property to himself." *Glass* v. *Hulbert*, 102 Mass. 24, 39, and cases cited. *Olliffe* v. *Wells*, 130 Mass. 221, 224, and cases cited. John W. Crane, though already named as beneficiary in the certificate, yet held this position only at the will of the insured member, who at any time could have revoked his designation and appointed another in his stead; and it is an irresistible inference from the facts found that this course would have been taken, and that another beneficiary within the class permitted would have been appointed but for the consent and engagement given by John.

But it is claimed that there was no valid consideration for this promise and the trust which resulted therefrom. This position however is sufficiently answered by what has been said. The beneficiary retained his position by reason of his undertaking, and that was consideration enough. As in the cases already referred to, it would be a fraud for him to receive and apply to his own use the proceeds which he has been enabled to obtain only by means of his promise to pay them to the plaintiff.

It is said that the interests both of the insured member and of this beneficiary were merely contingent and not actually vested rights of property in an existing fund. That is true. The amount of the benefit might never be realized at all. If it were to be realized, yet the member had no other interest therein than the bare power to appoint some person of a limited class to receive the fund if and when it should become due and payable. The beneficiary had no other interest than a mere expectancy dependent

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upon the will and pleasure of the insured member. But it does not follow that the holder of such a merely expected or contingent interest, growing or expected to grow out of actually existing, though defeasible, contractual rights, has no power of dealing with it, or that his engagements made with reference to such an interest while it is merely expectant and contingent, may not be enforced in equity after the interest shall have become vested and absolute. And it has been so held with reference to just such contingent and expectant rights as are here in question. *Hirsh* v. *Auer*, 146 N. Y. 13. *Dexter* v. *Supreme Council*, 97 App. Div. (N. Y.) 545. *Kimball* v. *Lester*, 43 App. Div. (N. Y.) 27, affirmed in 167 N. Y. 570. *Jarvis* v. *Binkley*, 206 Ill. 541. *Peek* v. *Peek*, 101 Ky. 423. That equitable rights might be attached to the proceeds of such a certificate was recognized by this court in *Mee* v. *Fay*, 190 Mass. 40, 42.

This disposition cannot be avoided on the ground that it was merely testamentary. *Kendrick* v. *Ray*, 173 Mass. 305.

The trust was sufficiently executed by the delivery of the certificate to the plaintiff and the promise of the beneficiary to pay the prospective fund to the plaintiff upon its receipt. No doubt all this rested upon a merely contingent foundation and might have been avoided by the member in his lifetime, through the appointment of a new beneficiary; but this was not done, and the rights of these parties are not now affected by that past contingency.

It is a more difficult question whether by the means here presented the benefit of the certificate can be secured to one who is not a member of the class described in the statute already quoted and in the rules of the defendant order. If the plaintiff claimed merely under the insured member, he could not maintain his claim. It is said that to permit him now to recover would be to allow that to be done by indirection which could not be done directly, and thus to frustrate both the legislative will and the intention of the parties to the contract. On this reasoning it was held in another State that an assignment of such a certificate made by the beneficiary thereof in the lifetime of the insured member and joined in by the latter was invalid. *Rose* v. *Wilkins*, 78 Miss. 401. It may be granted that a beneficiary association could not be required to make payment to any other persons than

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those specified in its regulations and in the statutes by which it is governed. The power of the court to deal with the beneficiary, to require him to collect the money that has become due and to pay it out according to the obligations into which he has entered, stands on a different footing. But the existence of even this power has been denied. *Gillam* v. *Dale*, 69 Kans. 362. In our opinion however there is a fundamental difference between the two propositions. The right of the beneficiary to bind himself by antecedent conduct or agreement as to what he will do with the proceeds of such a certificate when they shall come into his possession, subject only to the contingency of their so coming, is hardly to be denied. His prospective obligation becomes binding only when his contingent interest has become absolute. He has at first only a prospective right, which may never come into existence, but it is a right growing out of a presently existing subject matter, an expectancy which, if there is no change in the present state of affairs and if nothing intervenes to destroy rights which have been stipulated for, is likely in the natural order of events to ripen into a reality, a vested right which will then be capable of enforcement. The right of the beneficiary during the lifetime of the insured member closely resembles the expectation of a farmer to raise a crop which he intends to plant upon his land and which he pledges to obtain the seed therefor; or the expectation of an owner of domestic animals that they will yield a natural increase, about which he may make contracts in advance; or of a dairyman that his cows will yield milk, so that he may properly bargain for the disposing of the butter and cheese which he hopes to make therefrom. *Low* v. *Pew*, 108 Mass. 347, 350. And see the cases collected in 35 Cyc. 45, 46. It is enough that there is a present interest in the thing from which the expected article or right is to be directly produced. And even if the actual property does not pass in the future product or result of that which has a present existence, an agreement touching that future product or result may yet have validity and afterwards be capable of enforcement, as was held in the cases cited on page 228 of this opinion.

The beneficiary cannot indeed make a valid assignment of his expectant interest to one not within the limited classes; but as soon as his right has vested and become absolute, it is his property and he may dispose of it at his will. We see no reason why he may

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not in advance bind himself, at any rate, by the creation of a trust, to make such a disposition as we have here.

What has been said disposes also of the objection that this is an illegal result, an evasion of the statute. It has been found that the parties had no intention to evade the statutes of the Commonwealth or the "laws" of the defendant order. Nor does the accomplishment of their purpose have that effect. The payment of the benefit to the beneficiary is not to be interfered with. The property in that benefit, as between the order and the beneficiary, vests absolutely in the latter. The order is not concerned with the disposition which he may make of it. But it would be grossly inequitable to allow him to set up the legal title which he has acquired, as a means of evading the execution of the trust which he has assumed and by means of which he obtained both his expectant right and his absolute title.

The decree appealed from must be modified by providing that upon the surrender of the certificate the defendant order shall pay the amount thereof to the defendant John W. Crane, and that he shall forthwith pay the same to the plaintiff. The plaintiff should have also costs against the last named defendant.

So ordered.

MICHAEL S. REGAL & another *vs.* PERLA C. LYON, administratrix.

Suffolk. March 22, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Appeal.

Under R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, no appeal lies from a ruling of a judge of the Superior Court sustaining an answer in abatement and ordering judgment for the defendant, where no judgment has been entered.

CONTRACT against the administratrix of the estate of a constable for $110 alleged to have been deposited by the plaintiffs with the defendant's intestate in lieu of a bond to dissolve an attachment upon goods and effects of the plaintiffs. Writ dated April 4, 1910.

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In the Superior Court the defendant filed an answer in abatement. The case was heard upon the matters alleged in this answer by *Jenney*, J., who made an order as follows: "Sustained after hearing and judgment ordered for the defendant."

The judge filed a memorandum of findings, which is referred to in the opinion as constituting no part of the record. The memorandum concluded as follows:

"On the foregoing facts, I rule that this action cannot be maintained, and sustain the answer in abatement and order judgment for the defendant.

"I am somewhat in doubt as to whether the matters set forth in said answer are properly matters in abatement, but inasmuch as the parties have been fully heard and have introduced such evidence as they desired as to all matters involved in the action, I have made the order as indicated."

The plaintiffs filed the following statement:

"Now come the plaintiffs in the above entitled cause and appeal from said court to the Supreme Judicial Court for Suffolk County, for deciding the issues raised by the defendant's answer in abatement for the defendant."

The case was submitted on briefs.

S. Sigilman, for the plaintiffs.

W. H. Thorpe, for the defendant.

BRALEY, J. The memorandum of his findings of fact and reasons for decision filed by the presiding judge who heard the case without a jury cannot be considered as constituting a part of the record on which the plaintiffs' appeal is founded. If dissatisfied with the ruling sustaining the defendant's answer in abatement they should have excepted. No judgment having been entered there is no question of law apparent upon the record for this court to decide and the appeal must be dismissed. R. L. c. 173, § 96. St. 1906, c. 342, § 2. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31. *Chapman* v. *Briggs Iron Co.* 6 Gray, 330. *Hutchinson* v. *Tucker*, 121 Mass. 402. *Standish* v. *Old Colony Railroad*, 129 Mass. 158. *Ingalls* v. *Hobbs*, 156 Mass. 348. *New York Life Ins. Co.* v. *Macomber*, 169 Mass. 580. *Boyd, petitioner*, 199 Mass. 262. *Abbott* v. *Walker*, 204 Mass. 71.

So ordered.

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BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee, *vs.* BESSIE T. NEVIN & others.

Suffolk. March 25, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Devise and Legacy, What estate, Vested remainder. *Words*, "Children."

A will provided that the residue of the estate of the testator should be placed in trust during the lives of the testator's five children, three daughters and two sons, naming them, the income to be paid to them, "meaning and intending hereby that my estate shall be held in trust for the benefit of my children, during their several lives and upon the decease of any one of them, having children of his or her body such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body then such share to be added to the share of my surviving children or to whom his or her share shall have passed or who have become entitled thereto." As to a son A, it was provided that upon his death his widow should receive a life interest in his share. One daughter died without issue before the testator. A died first after the testator leaving a widow and no issue. A's widow survived all the children of the testator. A daughter then died leaving issue. A third daughter next died leaving no issue, and then the remaining son died, leaving issue. *Held*, that the issue of the son and the issue of the daughter each were entitled to one half of the estate subject to the life interest of A's widow in one third of it.

By the provisions of a will, the residue of the estate of the testator was placed in trust for the children of the testator for their lives "and upon the decease of any one of them, having children of his or her body such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body then such share to be added to the share of my surviving children or to whom his or her share shall have passed or who have become entitled thereto. The property is to be kept for my children and the children of their respective bodies and for no one else." When the will was made, all of the testator's children were married, and one son, J, had a son and a daughter. J and his children survived the testator and he was the survivor of the testator's children. Before his death his daughter died leaving children. His son survived him. Only one other child of the testator left issue. The trustee by a bill in equity sought instructions as to whether one half or the whole of the share given for the benefit of J should be paid to his son, and if one half, whether the other half should be paid to an administrator of the estate of J's daughter or to her children. *Held*, that the remainder in the children of J vested at the death of the testator, so that the estate which thus vested in J's daughter passed on her death to the administrator of her estate so far as it was personal property, and so far as it was real estate passed to her heirs.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 11, 1911, by the trustee under the will of Betsey Tirrell late of Weymouth, for instructions.

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The case was reserved by *Braley*, J., upon the bill, answers and an agreed statement of facts, for determination by this court.

The will of Betsey Tirrell was dated December 22, 1880, and contained three articles. The first article provided for an immediate payment of the debts and funeral expenses of the testatrix. The third article nominated a trustee and executor. The second article was as follows:

"Second. All the rest and residue of my estate, both real and personal and wherever the same may be, I give devise and bequeath to my son Alfred Tirrell of said Weymouth, to have and to hold the same in trust for the equal benefit of my children James Tirrell, Hannah Tirrell, the said Alfred Tirrell, Mary J. Bates, widow of James L. Bates, late of said Weymouth, and all of said Weymouth and Tirzah W. Durrell, wife of Moses T. Durrell of Boston in the County of Suffolk and during the respective lives of said children, but said principal or trust fund shall in no way be liable for nor subject to any debt or debts of any *cestui que trust* named, and to pay the income thereof as often as once in six months to said respective children or others entitled to same.

"In case the said James or Mary J. shall die before my decease, then his or her share shall go to and be divided among his or her respective children free and discharged of all trust —

"In case of the death of said Alfred, his share, shall be held in trust for his wife during her life, and upon her death to the survivors of my said children or to those to whom their several shares shall have passed or who have become entitled thereto. And in the case of the death of said Hannah or Tirzah W. before my decease their respective shares to go to the survivors of my said children or to those to whom their several shares shall have passed or who have become entitled thereto.

"Meaning and intending hereby that my estate shall be held in trust for the benefit of my children, during their several lives and upon the decease of any one of them, having children of his or her body such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body then such share to be added to the share of my surviving children or to whom his or her share shall have passed

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or who have become entitled thereto. The property is to be kept for my children and the children of their respective bodies and for no one else, except as provided for the wife of said Alfred.

"Said Alfred as such trustee is to have the power to sell any and all of the said estate and re-invest the proceeds in such manner as he may deem most expedient and advantageous, exercising his best judgment.

"Whatever may be due, payable or owing from the said James or the said Alfred and either of them to me on the first day of May A.D. 1880 is not to be deducted from their share or portion of my estate but is to be cancelled and discharged and deemed paid."

There was a codicil dated March 5, 1883, the provisions of which are not material.

The testatrix died on August 13, 1888, her daughter Hannah having died before her, unmarried and without issue.

The testatrix was survived by the following children: Alfred Tirrell, James Tirrell, Mary J. Bates and Tirzah W. Durrell, all of whom had died before this suit was begun.

Alfred died without issue on May 7, 1890, and left surviving him his widow, M. Frances Tirrell, who was a defendant.

Mary J. Bates died on August 22, 1905, and left surviving her a daughter, Bessie T. Nevin, who was a defendant.

Tirzah W. Durrell, died on December 30, 1907, and left no husband or issue surviving her.

James Tirrell died on March 27, 1909, and left surviving him his widow, two grandchildren, Cranmore W. Brook, born in 1901, and Tirrell Brook, born in 1906, children of his daughter Helen F. Brook, who were defendants, and a son James Tirrell, junior, who was a defendant. Helen F. Brook was thirty-six years old at the time of her death on April 25, 1906. Her husband, Fleeming Brook, was appointed the administrator of her estate and was a defendant.

No distribution had been made of the principal of the trust.

The plaintiff asked for instructions on the following questions:

"1. Should one half or the whole of the share for the benefit of James Tirrell be paid to James Tirrell, Jr.?

"2. If only one half of the share for the benefit of James Tirrell should be paid to James Tirrell, Jr., should the other half be paid to the administrator of his deceased daughter, Helen F. Brook, or

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to Cranmore W. Brook and Tirrell Brook, children of said Helen F. Brook?

"3. Should the share for the benefit of Tirzah W. Durrell be added to the share for the benefit of James Tirrell, who was the only child of the testatrix living at the time of the death of said Tirzah, or should it be divided between the shares for the benefit of James Tirrell and Mary J. Bates, or should it be divided between the shares for the benefit of James Tirrell, Alfred Tirrell, and Mary J. Bates?"

The case was submitted on briefs.

G. L. Barnes, for Bessie T. Nevin and James Tirrell, Jr.

E. C. Bumpus, for M. Frances Tirrell.

J. W. McAnarney & J. B. Sullivan, Jr., for Cranmore W. Brook and Tirrell Brook.

SHELDON, J. Hannah Tirrell having died before the testatrix, the four surviving children of the latter took the residue of her estate in equal shares for their lives, with remainders except as to Alfred Tirrell to their respective children, if any. Upon his decease his share went to his widow for her life. After his death, Mrs. Durrell, another child of the testatrix, died without issue. Thereupon, by the express terms of the second clause of the will, the share of the income which Mrs. Durrell had received went to increase the shares of the other children, or of those who had become entitled to the share of any deceased child. This is the only construction which can be given to the language of the will. M. Frances Tirrell, the widow of Alfred Tirrell, became entitled to what Alfred was to have taken. In like manner Mrs. Nevin, by the decease of her mother Mrs. Bates, had become entitled to the amount of which the income would have gone to Mrs. Bates. That sum was one fourth part of the residue until the decease of Mrs. Durrell, and was increased upon that decease to one-third. So the share of James Tirrell in the income of the trust fund was likewise increased upon the decease of Mrs. Durrell to one third part thereof. *Cook* v. *Smith*, 101 Mass. 341. *Bowker* v. *Bowker*, 148 Mass. 198. *Sanger* v. *Bourke*, 209 Mass. 481. It follows that after the death of Mrs. Durrell, M. Frances Tirrell became and still is entitled for her life to the income of one third of the fund, and the shares represented respectively by Mrs. Bates and James Tirrell are each one third part of the fund, or what is

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the same thing, one half part thereof subject to the life interest of M. Frances Tirrell in one third part thereof.

The testatrix evidently intended that upon the death of any one of her children, the children of any of her own children who were then deceased should share *per stirpes* with the surviving children in the part of which the deceased child had enjoyed the income, and that such children of a deceased child should take the share that their parent would have taken had he or she been living. *Minot* v. *Taylor*, 129 Mass. 160. *Niles* v. *Almy*, 161 Mass. 29. The language of this testatrix differs from that which was construed in *Lawrence* v. *Phillips*, 186 Mass. 320, and *Dary* v. *Grau*, 190 Mass. 482.

The son James Tirrell after the death of Mrs. Durrell had an equitable life estate in one third part of the fund, and the principal thereof was to go to his children. He died in 1909, leaving one son, James Tirrell, Jr., and two grandchildren, the children of a daughter who had died during his lifetime. One question raised is as to the disposition of this part of the fund. This is to be determined by the language of the will construed with reference to the state of affairs so far as that was known to the testatrix, or fairly must be presumed to have been contemplated by her. We are only to give effect to her intention as thus determined. *Sanger* v. *Bourke*, 209 Mass. 481, 487. This testatrix has undertaken to declare her intent. After the provision that upon the decease of any one of her children "having children of his or her body," such children should take the share of their parent, she says "the property is to be kept for my children and the children of their respective bodies," with an exception not now material. It is contended that this language taken literally would include only the son of James Tirrell who survived him, and would exclude his two grandchildren, the children of his deceased daughter Helen, who had died during the lifetime of her father.

As was said by Hoar, J., in *Houghton* v. *Kendall*, 7 Allen, 72, 75, "The general rule is, that where there are children who fully answer the description, and confining the bequest to them will satisfy the whole apparent design of the testator, grandchildren or other more remote descendants will not be permitted to share with them, because in the ordinary use of language the word 'children' does not include grandchildren," although "where there

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is any reason to suppose that such was the intention of the testator, 'children' may be construed as meaning 'issue'." It is claimed by James Tirrell, Jr., that no such intention can be found in the will; that the word "children" must be limited to its exact and proper signification; and that he, as the only person who upon the death of his father answered to that description, now is entitled to the whole share of which his father received the income. *Bragg* v. *Carter*, 171 Mass. 324. *Lawrence* v. *Phillips*, 186 Mass. 320. There is force in this argument; and it perhaps would be unanswerable if it depended solely upon the meaning of the word "children," and if it were not for another circumstance which in our opinion is decisive against this contention.

This will was dated December 22, 1880. The testatrix died on August 13, 1888. Helen F. Brook, the deceased daughter of James Tirrell, died on April 25, 1906, aged thirty-six years, so that she must have been born on or before April 25, 1870. It therefore appears that both when the will was made and when the testatrix died, the son James Tirrell had living these two children, as must have been known to the testatrix. Under the bequest to their father for life with remainder to the children of his body, they respectively took indefeasible vested remainders in fee, remainders which were none the less vested because they might have been opened to let in after-born children of their father or because the property which was the subject of these remainders might be, as it was, afterwards increased in amount by the death of other life tenants. This point was expressly decided, with numerous references to earlier cases, in *Wight* v. *Shaw*, 5 Cush. 56. It was again so held, upon facts which in essential matters closely resembled those now presented in *Gardiner* v. *Guild*, 106 Mass. 25. There are many similar decisions. *Fay* v. *Sylvester*, 2 Gray, 171. *Gibbens* v. *Gibbens*, 140 Mass. 102. *Dole* v. *Keyes*, 143 Mass. 237. *Dodd* v. *Winship*, 144 Mass. 461. *Lombard* v. *Willis*, 147 Mass. 13. *Marsh* v. *Hoyt*, 161 Mass. 459. *Shaw* v. *Eckley*, 169 Mass. 119. *Minot* v. *Purrington*, 190 Mass. 336. *Minot* v. *Doggett*, 190 Mass. 435. *Gray* v. *Whittemore*, 192 Mass. 367, 376. *Bryant* v. *Flanders*, 201 Mass. 373. Both of these children, James and Helen, perfectly answered the description given in the will, both when it was made and when it took effect at the death of the testatrix, and there is nothing to control the presumption that the interest of each of

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them became vested at the latter date. *Pike* v. *Stephenson*, 99 Mass. 188. *Cummings* v. *Cummings*, 146 Mass. 501. *Lombard* v. *Willis*, 147 Mass. 13. *Cushman* v. *Arnold*, 185 Mass. 165.

The will does not provide that the remaindermen are to be ascertained only at the end of the life estate, a circumstance upon which stress has been laid in some cases. And the presumption that it was intended to give vested interests is strengthened by the fact that the provision is for the benefit of the direct descendants of the testatrix. *Stanwood* v. *Stanwood*, 179 Mass. 223. *Crapo* v. *Price*, 190 Mass. 317, 319. *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35, 39.

It follows that the right to the share of which James Tirrell enjoyed the income is now vested one half in James Tirrell, Jr., and one half in the estate of his deceased daughter Helen.

There is no dispute, and we think it plain, that subject to the life interest of M. Frances Tirrell in one third part of the fund, it belongs wholly to Mrs. Nevin and the issue of James Tirrell.

So far as the share which, as we have held, vested in Helen F. Brook consists of real estate, it should be transferred to her children Cranmore W. Brook and Tirrell Brook, if as seems to have been assumed they were her only heirs; so far as it consists of personal property, it should be paid to the administrator of her estate. *Marsh* v. *Hoyt*, 161 Mass. 459. *O'Brien* v. *Lewis*, 208 Mass. 515.

The plaintiff is to be instructed that subject to the right of M. Frances Tirrell to the income of one third of the fund, it belongs one half part to Mrs. Nevin and one half part to the son and the estate of the daughter of James Tirrell; and that payment and transfer should be made in the manner which has been stated.

So ordered.

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MORRIS GRAY & another, trustees, *vs.* AUGUSTUS HEMENWAY & others.

Suffolk. March 27, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Capital and Income. Trust. Corporation. Equity Pleading and Practice, Costs.

A Pennsylvania railroad corporation operating in part over a long, crooked and hilly route in New Jersey, in order to make that route shorter and more advantageous had its engineers survey a cut-off route and caused a New Jersey corporation to be organized to secure a right of way and build a railroad over the new route. The New Jersey corporation secured the right of way and constructed the new route with funds furnished by the Pennsylvania corporation from its surplus. For the funds so furnished the Pennsylvania corporation received all of the capital stock of the New Jersey corporation excepting such as was necessary to qualify the directors of that corporation. The Pennsylvania corporation then received a perpetual lease of all the property of the New Jersey corporation, agreeing to pay to stockholders of the New Jersey corporation "interest at the rate of four per cent per annum upon the par value of" their stock, and declared to its own stockholders an extra dividend payable in shares of stock of the New Jersey corporation, the amount of which was much less than the accumulated earnings or undivided surplus of the Pennsylvania corporation. Trustees who were stockholders of the Pennsylvania corporation by a bill in equity sought instructions as to whether such dividend should be treated as part of the principal of the trust fund or should be distributed as income. *Held,* that the dividend should be treated as income.

In this suit in equity by trustees for instructions as to whether a certain extra dividend paid to them by a corporation of which they were stockholders was a part of the principal of the trust fund or should be distributed as income, it being determined that the dividend should be distributed as income, it was *held,* that the costs of the litigation should be charged upon the principal of the fund.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 21, 1912, by the trustees under the will of Augustus Hemenway, late of Milton, for instructions as to whether a certain extra corporation dividend described in the opinion and received by the plaintiffs should be added to the principal of the trust fund or paid over to those entitled to receive the income of that fund.

The case was reserved by *Braley,* J., upon the bill and answers for determination by the full court. The answers admitted the allegations of fact in the bill. From the bill it appeared that the

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Delaware, Lackawanna and Western Railroad Company, desiring to avoid a long, crooked and hilly route between Slateford, Pennsylvania, and Port Morris, New Jersey, for two years previous to 1907 had engineering parties locating a new cut-off line between those points and, a satisfactory line having been located, in that year took preliminary steps for the organizing of a new corporation under the laws of New Jersey for the purpose of procuring the right of way and building the line. Such a corporation was organized on February 8, 1908, and was called the Lackawanna Railroad Company, and the construction of the line was begun, the Delaware, Lackawanna and Western Railroad Company advancing from its surplus all the money necessary for the enterprise, for which it received capital stock of the New Jersey corporation at par and thus became the owner of all of that corporation's capital stock excepting such shares as were necessary to qualify directors. The perpetual lease by the New Jersey corporation to the Pennsylvania corporation described in the opinion included provisions that the New Jersey corporation should continue its corporate existence and that its stockholders should receive from the Pennsylvania corporation "interest at the rate of four per cent per annum upon the par value of" their stock. Other facts are stated in the opinion.

H. D. Tudor, for the plaintiffs, stated the case.

J. L. Thorndike, for the defendants entitled to the income.

J. G. Palfrey, as guardian *ad litem*, and for defendants interested in remainder.

SHELDON, J. The dividend here in question was declared out of its surplus or accumulated profits by the Delaware, Lackawanna and Western Railroad Company, a corporation organized under the laws of Pennsylvania. That corporation had invested a part of its surplus by subscribing for and taking the stock of the Lackawanna Railroad Company, a New Jersey corporation, the line of which formed a cut-off between two points on the road of the Pennsylvania company and so materially shortened its track. The Pennsylvania company then took a perpetual lease of the railroad and all other property of the New Jersey company, and thereafter declared a dividend to its own stockholders payable in the stock of the New Jersey company. The amount of this dividend was much less than the accumulated earnings of undivided sur-

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plus of the Pennsylvania company. The plaintiffs have received this dividend and now hold the same, amounting to two hundred and one shares of the capital stock of the New Jersey company and $25 in money, and ask to be instructed as to the disposition of this amount, whether it should be added to the principal of the trust fund or paid over to those who are entitled to receive the income of that fund.

In our opinion the case is governed in principle by the decision in *Leland* v. *Hayden*, 102 Mass. 542, 551. Here, as in that case, the shares distributed represented an investment of accumulated profits, and it can make no difference that the investment was made by original subscription for the shares taken instead of purchasing them in the market. Here, as in that case, if the directors of the Pennsylvania company had sold the shares and divided the proceeds among their stockholders, there could have been no doubt that it was a cash dividend and belonged, as between tenants for life and remaindermen, to the former. Here, as in that case, the declaration and payment of the dividend did not affect the value of the shares on which it was made relatively to the whole capital stock of the company. In essential respects the two cases are alike.

It is the characteristic feature of a stock dividend that the property of the corporation itself remains unchanged, but that each one of the shares of the increased capital stock represents a smaller fractional interest than before in the total amount of the corporate property. On the other hand it is the characteristic feature of a dividend declared and paid wholly from the net profits or undivided earnings that it does diminish the property of the corporation by exactly the amount of the dividend so paid out, while it leaves the fractional interest represented by each share of the capital stock exactly what it was before. *Gibbons* v. *Mahon*, 136 U. S. 549, 559, 560. Tested in this way, the dividend here in question was not a stock dividend properly so called. It left the corporation the poorer by what was given to the stockholders; it left the proportional interest of each stockholder in the diminished *quantum* of the corporate property exactly what it had been.

As in *Leland* v. *Hayden*, *ubi supra*, we do not regard the fact that the dividend was payable in stock as decisive. Just as a

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dividend purporting to be made in cash will be regarded as a stock dividend, when it manifestly was intended to be such, because the real nature of the transaction must be determined from what was done in carrying it out (*Daland* v. *Williams*, 101 Mass. 571; *Rand* v. *Hubbell*, 115 Mass. 461; *Brownell* v. *Anthony*, 189 Mass. 442; *Bouch* v. *Sproule*, 12 App. Cas. 385), so the mere fact that a dividend may first or last take the shape of certificates of stock does not necessarily make it a stock dividend. *Leland* v. *Hayden*, *ubi supra*. *Hyde* v. *Holmes*, 198 Mass. 287.

Moreover by a stock dividend is generally understood a distribution made by a corporation of shares of its own stock. This was not such a case. The shares distributed were those of another and wholly different corporation, created under the laws of another State and having an absolutely distinct corporate existence. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 211 Mass. 398, 403, 404. For this reason also what took place here was not in any sense a distribution which, without affecting the intrinsic value of the corporate property, simply divided it into a greater number of shares. The capital stock of the dividing corporation was the same after the declaration and payment of this dividend as before. In this respect the case resembles *Gray* v. *Hemenway*, 206 Mass. 126, in which the stockholders received money with a strong inducement to invest it at once in the stock of another corporation, while here they receive the stock of another corporation and are left at liberty to keep it or dispose of it as it may please them to do.

This dividend was in no sense a partial liquidation of the capital stock of the corporation or of capitalized profits used in its business, as in *Heard* v. *Eldredge*, 109 Mass. 258, *Gifford* v. *Thompson*, 115 Mass. 478, *Mercer* v. *Buchanan*, 132 Fed. Rep. 501. See *D'Ooge* v. *Leeds*, 176 Mass. 558. If the corporation had sold these shares instead of distributing them, that would not have involved such a liquidation. Nor was the amount of the dividend a profit realized from increases in value or fortunate reinvestments of capital, as in *Smith* v. *Hooper*, 95 Md. 16.

The use made by the corporation of a part of its surplus fund in taking shares of the stock of another company was, as we have said, an investment, rather than a capitalization thereof by applying it upon the road or other permanent works of the company it-

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self. It was none the less an investment that it doubtless was intended to be indirectly advantageous by allowing the company to obtain a shorter line of railroad as well as directly profitable from its capability of returning a fair income. For this reason we have not found it necessary to consider the question suggested in *Hemenway* v. *Hemenway*, 181 Mass. 406, 411, and somewhat discussed at the bar, whether accumulated profits once devoted to permanent capital purposes can be set free and divided as income among stockholders by the paying in of an equal amount as capital. The decisive fact is that this was an investment rather than a permanent application of the company's own property. It remained in the control of the directors; and their action taken in good faith in paying it out as a dividend to the stockholders is not to be reviewed by us. See besides the cases already cited, *Minot* v. *Paine*, 99 Mass. 101; *Davis* v. *Jackson*, 152 Mass. 58; *Smith* v. *Dana*, 77 Conn. 543.

The petitioners are to be instructed that this dividend should be treated as income and paid to the beneficiaries for life according to their respective interests.

The costs of the litigation should be charged upon the principal of the fund. *Beauclerk* v. *Ashburnham*, 8 Beav. 322, 329. *In re Hubbuck*, [1896] 1 Ch. 754, 762. *In re Bennett*, [1896] 1 Ch. 778, 783, 787. In this way the burden will fall in due proportion upon all the parties in interest, as in *Plympton* v. *Boston Dispensary*, 106 Mass. 544, 547.

So ordered.

JOHN J. O'DONNELL, administrator, *vs.* INHABITANTS OF NORTH ATTLEBOROUGH.

Bristol. March 29, 1912. — May 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Municipal Corporations. Statute, Construction.

R. L. c. 34, § 28, providing, that "a city or town which owns or operates a gas or electric lighting plant shall be liable for any injury or damage to persons or property caused by its maintenance or operation, in the same manner and to the same extent as a private corporation," imposes no liability for causing death,

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the liability set forth in this section being the same created by St. 1891, c. 370, § 16, which created no liability for death, and not having been enlarged by the codification of such § 16 into § 28 of R. L. c. 34.

R. L. c. 171, § 2, as amended by St. 1907, c. 375, relating to the liability of "a person or corporation" for causing death "by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business," does not apply to a town or city in connection with its maintenance or operation of an electric lighting plant under the provisions of R. L. c. 34.

St. 1897, c. 416, relating to the liability for loss of life of "a corporation operating a gas or electric light plant or system," which with St. 1898, c. 565, was codified into R. L. c. 171, § 2, did not apply to a town or city operating a gas or electric light plant.

TORT by the administrator of the estate of Thomas E. O'Donnell, late of North Attleborough, for the death of the plaintiff's intestate on March 12, 1909, alleged to have been caused by his hand coming in contact with a guy wire leading to the top of a pole which formed a part of an electric lighting plant maintained and operated by the defendant, whereby the intestate received an electric shock from which he died. Writ dated May 8, 1909.

In the Superior Court the case was tried before *Hall*, J. At the close of the evidence the defendant asked the judge to order a verdict for the defendant on all the evidence, and also asked for a ruling that there was no evidence of the due care of the intestate. By agreement of the parties the jury returned a verdict for the plaintiff in the sum of $4,000, and the judge reported the case for determination by this court. If either ruling should have been given, judgment was to be entered for the defendant; otherwise, judgment was to be entered on the verdict.

C. R. Cummings, for the plaintiff.

F. S. Hall, for the defendant.

SHELDON, J. The defendant town has an electric lighting plant under the provisions of the statutes now codified into R. L. c. 34 and the acts in amendment thereof. Section 28 of this chapter provides that any city or town which does so shall be liable for "any injury or damage to persons or property caused" by the maintenance or operation of its plant "in the same manner and to the same extent as a private corporation." Other statutes provide that any "person or corporation" that negligently causes the death of a person shall under certain restrictions be liable, in an action by the executor or administrator of the deceased person, to damages as therein stated. R. L. c. 171, § 2. St. 1907, c. 375. This action

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is brought under the last cited statutes to recover damages for the death of the plaintiff's intestate alleged to have been caused by the defendant's negligence in the maintenance and operation of its electric lighting plant. The first question presented is whether such an action against a town can be maintained.

It is suggested by the plaintiff that this point cannot now be raised because it does not appear to have been taken at the trial. But the defendant then contended that on the evidence a verdict should be ordered in its favor. It may now support this contention by any lawful argument. *Parrot* v. *Mexican Central Railway*, 207 Mass. 184, 190. *Vermilye* v. *Western Union Telegraph Co.* 207 Mass. 401, 405, 406.

The power to maintain gas and electric lighting plants was given to cities and towns by St. 1891, c. 370. Section 16 of this act created the same liability for negligence which is now set forth in R. L. c. 34, § 28. This created no liability for death; for in 1891 there was no statute imposing upon such a private corporation liability for the death of one not in its service or employment, though caused by its negligence. See the discussion of this question by the present Chief Justice in *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8. Such a liability was first created by St. 1897, c. 416, which gave a remedy against a corporation "operating a gas or electric light plant or system," which by its negligence or the unfitness or gross negligence of its servants or agents caused the death of a person who was not in its employ and who was exercising due diligence. This act, with St. 1898, c. 565, giving a similar remedy against any person or corporation, was afterwards codified into R. L. c. 171, § 2, which since has been amended by St. 1907, c. 375.

The question therefore is whether the general language "a person or corporation" must be taken to include cities and towns. We state the question in this form, because we think it plain that the codification of St. 1891, c. 370, § 16, into R. L. c. 34, § 28, cannot give any broader meaning to the words of the original statute than that which they had at the time of their enactment. *Great Barrington* v. *Gibbons*, 199 Mass. 527.

It has been a general rule in our legislation that statutes passed for the regulation of the rights and liabilities of corporations are to be applied only to private or moneyed corporations and not to

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public or municipal corporations or *quasi* corporations. *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, 18. *Linehan* v. *Cambridge*, 109 Mass. 212, 213. As was said in the case last cited, the main purpose in the organization of the latter is political; the object of the Legislature in creating them has been to regulate the performance of public and political duties. *Ware* v. *Fitchburg*, 200 Mass. 61, 67, 68. And see the cases gathered in *Donohue* v. *Newburyport*, 211 Mass. 561. And it still remains true, although there have been two revisions of our statutes since the decision of *Linehan* v. *Cambridge*, *ubi supra*, that "the statutes of the Commonwealth which relate to . . . [cities and towns] . . . are collected and classified by themselves;" R. L. Title VII. cc. 25–34; while those which relate to the powers, duties and liabilities of corporations contain no reference to towns or cities, but are "devoted to the regulation of private and moneyed corporations." R. L. Title XV. cc. 109–126. It is especially noteworthy that the powers and liabilities of cities and towns which undertake to maintain gas or electric lighting plants are dealt with by themselves in one part of the provisions for the regulation of such public or governmental corporations; R. L. c. 34; while gas and electric light companies are considered, and provision is made for the conduct of their affairs and for the regulation of their powers and liabilities by an entirely different set of requirements. R. L. c. 121. When the Legislature did intend that some of these latter provisions should be applicable to cities and towns, this was done by express enactment. R. L. c. 121, § 38. We have here a case for the application of the maxim, *expressum facit cessare tacitum*. The provisions of R. L. c. 34, § 30, do not relate to this subject matter. So far as they afford ground for argument they tend to support the view which we have stated.

Accordingly we are of opinion that the language of R. L. c. 171, § 2, like that of St. 1897, c. 416, and of St. 1898, c. 565, does not include within its scope municipal or *quasi* municipal corporations, (*Donohue* v. *Newburyport*, *ubi supra*) and that this action cannot be maintained under either of those statutes.

It is no doubt true that where a business is lawfully conducted by a city or town, partly and incidentally at least for profit, the city or town is liable at common law for negligence in its management thereof. *Duggan* v. *Peabody*, 187 Mass. 349, 451. *Haley* v.

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Boston, 191 Mass. 291. It may be therefore that the language of R. L. c. 34, § 28, is merely declaratory. But it is also true, as has been pointed out, that our laws give no civil remedy for the death of a human being except as provided by statute.

In other States, a broader meaning has been given to similar statutes, and they have been held to include public or municipal corporations. *Davis* v. *Rumney*, 66 N. H. 331. *McCaughey* v. *Tripp*, 12 R. I. 449. *Titman* v. *Mayor of New York*, 57 Hun, 469, affirmed in 125 N. Y. 729. *Murphy* v. *Board of Chosen Freeholders*, 28 Vroom, 245. *Merkle* v. *Bennington*, 58 Mich. 156. *Keever* v. *Mankato*, 113 Minn. 55. But the course of our legislation does not permit us to follow these cases, whatever we otherwise might be inclined to do. Cases like *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 25, and *Rains* v. *Oshkosh*, 14 Wis. 372, rest upon a different principle. As to cases under our employers' liability acts, see *Coughlan* v. *Cambridge*, 166 Mass. 268; *Murphy* v. *Needham*, 176 Mass. 422.

The plaintiff contends that he can recover for a defect in the street under R. L. c. 51, § 17. But his declaration sets out no such cause of action. It does not even aver that the place of the accident was a public way. Nor does it sufficiently charge any injury to the plaintiff's intestate in his lifetime, whereby conscious suffering was caused to him. The only averment as to that is that he "was killed." Plainly the declaration was framed only under R. L. c. 171, § 2. The Superior Court might allow an amendment if it appeared that justice so required; but we can pass only upon the record presented.

The other questions raised need not be considered. Upon the evidence a verdict for the defendant should have been ordered; and on the terms of the report judgment must be entered in its favor.

So ordered.

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LYDIA B. HORTON, administratrix, *vs.* LOUISE I. ROBINSON, executrix.

Dukes County. March 12, 1912. — May 31, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Executor and Administrator, New assets.

In an action against an executor by a creditor of the defendant's testator, brought under R. L. c. 141, § 11, after the expiration of the two year period of limitation alleging that the defendant had received new assets of which the plaintiff first had notice within one year, it appeared that the defendant was the sole legatee and devisee under the will of his testator, that he filed an inventory in which he set forth as all the estate of the testator $25 of personal property and no real estate, that about a year and a half after his appointment the defendant brought a suit in equity in his own name as devisee against a person to whom the testator had given a deed of real estate absolute in form, alleging that the deed was in fact a mortgage and seeking to redeem the real estate, and that more than two years after giving notice of his appointment he obtained a decree for redemption under which he received a deed of the real estate on paying personally the amount of the mortgage debt. It further appeared that the defendant when he filed the inventory knew that his testator had made the deed alleged to be a mortgage and of the grantor's alleged promise to reconvey the real estate. The plaintiff brought his action within one year after notice of the decree and of the deed to the defendant thereunder. *Held*, that by the decree and the conveyance thereunder the real estate became new assets of the testator's estate.

St. 1907, c. 549, limiting the time within which real estate of a deceased person conveyed absolutely or in mortgage for value and in good faith can be taken or sold for payment of his debts, has no application to an action brought against an executor after the expiration of the two year period of limitation by a creditor of the defendant's testator, alleging that certain real estate conveyed by the testator by a deed absolute in form and redeemed by the executor as sole devisee had become new assets of the estate under R. L. c. 141, § 11, of which the plaintiff first had notice within one year.

CONTRACT against the executrix of the will of Clarissa N. F. Norris upon a judgment against the defendant's testatrix for $1,663.86, alleging that the defendant within one year had received new assets of the estate of her testator. Writ dated May 6, 1910.

In the Superior Court the case was submitted to *Crosby*, J., upon an agreed statement of facts and an amendment thereto, by which the following facts appeared:

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The plaintiff brought the action as the administratrix of the estate of Samuel Boyd, Jr. As such administratrix on September 2, 1901, she obtained the judgment sued upon against Norris, the defendant's testatrix, and no part of it was paid. Norris died on October 30, 1904, and on August 14, 1905, the defendant was appointed executrix of her will. On October 7, 1905, the defendant filed an affidavit of having given notice of her appointment, and on the same day filed an inventory of the estate in which she set forth as all of the estate of Norris $25 of personal property and no real estate. When the inventory was filed the plaintiff was ignorant of any real estate of Norris. On February 21, 1910, the defendant filed a "first and final" account, in which the only assets shown or accounted for were $25, and asked to be allowed for payments and charges to the amount of $101.75. This account never was acted upon or allowed. By the will of Norris the defendant personally was given all the property real and personal of the testatrix and was nominated executrix of the will. On February 9, 1907, the defendant personally brought an action, later changed to a bill in equity, against one Frank H. Newcomb, alleging that on August 31, 1901, Norris was seised in fee simple of certain real estate at Oak Bluffs which by a quitclaim deed of that date, duly recorded, she conveyed to Newcomb, that such deed was absolute in form but was in fact a mortgage, alleging further that the present defendant was the sole devisee under the will of Norris, and praying to be permitted to redeem such real estate. A decree was entered "that the plaintiff (Louise I. Robinson) is entitled to redeem," and the defendant Newcomb was ordered "to convey to the plaintiff (Louise I. Robinson) by quitclaim deed free from all incumbrances made or suffered by, through or under him" the said real estate upon payment of the sum of $474.12 less $38.83 costs. This decree was made on April 30, 1909. Newcomb filed an appeal and also a motion for a new trial. The appeal was waived in July, 1909, and the motion for a new trial was denied on July 2, 1909. By a deed bearing the date of the decree Newcomb conveyed the real estate to the defendant personally, as ordered by the decree. The deed was acknowledged on July 5, 1909, and was recorded on July 16, 1909. The plaintiff brought the present action within one year after notice of the decree.

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The defendant at the time she filed the inventory as executrix of the will of Norris knew of the deed from Norris to Newcomb and of Newcomb's alleged promise to reconvey.

The defendant offered to prove that by a deed recorded on July 16, 1909, she personally conveyed the real estate to one Pauline McArthur. The plaintiff agreed that such was the fact but excepted to the admission of the evidence. The judge admitted the evidence subject to the exception.

It was agreed that the court might draw inferences of fact from the facts stated.

The judge made the following finding:

"This case having been submitted to me upon an agreed statement of facts and amendment thereto with power to draw inferences from such agreed facts, I find that the real estate which by final decree in equity made on April 30, 1909, was ordered conveyed by Newcomb to the defendant, and which real estate was thereafter in accordance with said decree conveyed to the defendant by deed recorded July 16, 1909, constituted new assets in the hands of the defendant in her capacity as executrix of the will of Clarissa N. F. Norris."

The judge found for the plaintiff in the sum of $2,568. From a judgment entered in accordance with this finding the defendant appealed.

The case was submitted on briefs.

W. A. Morse & F. J. Geogan, for the defendant.

M. E. S. Clemons, for the plaintiff.

BRALEY, J. By force of the decree in the suit in equity the deed of the testatrix conveying the land in question although unconditional in form in legal effect became a mortgage at the date of delivery to the grantee, and at her death she was seised of an equity of redemption which under the will passed by devise to the defendant. *Ewer* v. *Hobbs*, 5 Met. 1, 3. *Campbell* v. *Dearborn*, 109 Mass. 130. It is immaterial that the defendant brought the bill as devisee, or that in compliance with the decree the property upon payment of the mortgage debt, apparently from her own funds, was reconveyed to her as if she had been the original owner, or that subsequently she sold and conveyed it and received the purchase price. The defendant in the primary discharge of her duty as executrix was bound to collect and apply the assets of the estate

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in payment of the debts of the testatrix, and, if she had redeemed within two years after giving notice of her appointment, the land notwithstanding the form of conveyance would have been held by her for the benefit of creditors. *Putney* v. *Fletcher*, 148 Mass. 247, 248. *Marvel* v. *Babbitt*, 143 Mass. 226. *Dudley* v. *Sanborn*, 159 Mass. 185. R. L. c. 146, §§ 1, 2. And she would have been entitled to reimbursement upon the settlement of her accounts in the court of probate for money advanced to discharge a valid mortgage debt of the testatrix. *Munroe* v. *Holmes*, 13 Allen, 109. The plaintiff, moreover, upon recovery of judgment against the defendant as executrix after redemption, and before expiration of the limitation could have levied the execution upon the land whether the ostensible title stood in her name or in the name of her grantee. *Tracy* v. *Strassel*, 191 Mass. 187.

But, as more than two years have elapsed since the defendant duly published notice of her appointment before the date of the plaintiff's writ, the action cannot be maintained unless under the provisions of R. L. c. 141, § 11, the estate when reconveyed is deemed new assets which can be applied in payment of debts, as if the property had been received within the two years. The omission of the executrix to inventory the property although she knew of the promise to reconvey upon payment of the loan, while significant, is not decisive of the question. *Gould* v. *Camp*, 157 Mass. 358, 360. It is certain, however, that by a conveyance absolute upon its face the testatrix had parted with the fee, and whether the oral agreement could be established depended as the event proved upon the successful outcome of future litigation. The statute should be given a practical application which will advance, and not defeat through over-refined distinctions, the remedy given to the creditor. *Fay* v. *Haskell*, 207 Mass. 207, 217. When the testatrix died no suit was pending as in *Bradford* v. *Forbes*, 9 Allen, 365, where after judgment the money collected was held not to be new assets, and the uncertainty of a suit in equity which would have to be instituted by the executrix to enforce the alleged right to redeem would not be considered ordinarily a commercial asset, or the equivalent of the property involved. It was not in the possession or within the control of the executrix until recovered, and an application for license to sell for the payment of debts a prospective law suit would have been a useless and

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vain formality. If the right to redeem was vested in the testatrix, the uncertainty whether it had any appreciable value was much greater than that in *Quincy* v. *Quincy*, 167 Mass. 536, and in *Copeland* v. *Fifield*, 180 Mass. 223, where a reversionary interest in real property supposed to have had no value at the intestate's death, and not inventoried, but which long afterwards proved to be valuable, and profits made by an administrator who continued the business of his intestate, were decided to be assets. The defendant was not previously liable for this portion of the estate, but when she received the conveyance the property constituted assets not in existence when the inventory was filed, and which were new. *Chenery* v. *Webster*, 8 Allen, 76, 77. *Welsh* v. *Welsh*, 105 Mass. 229, 231. *Glines* v. *Weeks*, 137 Mass. 547.

It is contended by the defendant, that under the St. of 1907, c. 549, limiting the time within which the real estate of deceased persons conveyed absolutely or in mortgage for value and in good faith can be taken or sold for payment of their debts, the action is barred. But independently of the question, whether a devise of real estate is embraced within the words, "the real estate of the deceased conveyed absolutely or in mortgage," this statute is inapplicable where the property upon redemption becomes assets of the estate.

The action having been begun within one year after the date of the acknowledgment and recording of the deed delivered by the mortgagee in accordance with the decree, the judgment of the Superior Court for the plaintiff should be affirmed. R. L. c. 141, § 11.

So ordered.

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COMMONWEALTH *vs.* MAX PERETZ.

Suffolk. March 11, 1912. — June 4, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ

Practice, Criminal, Indictment.

An indictment found on August 6, 1910, under St. 1910, c. 424, § 5, charging that the defendant during the three months next preceding the finding of the indictment, knowing a certain woman to be a prostitute, did derive support and maintenance in part from the earnings and proceeds of her prostitution, is sufficient, although that statute did not go into effect until after the beginning of the three months named in the indictment and the acts charged to have been committed by the defendant were not indictable during the first part of the period described.

INDICTMENT, found and returned on August 6, 1910, under St. 1910, c. 424, § 5, charging that the defendant at Boston, "during the three months next preceding the finding of this indictment, well knowing one Freida Peretz to be a prostitute, did derive support and maintenance in part from the earnings and proceeds of the prostitution of said Freida Peretz as such prostitute."

In the Superior Court the case was tried before *Sanderson,* J. Before the jury were sworn the defendant moved to quash the indictment, assigning as one of the reasons that the indictment alleged a portion of the time when no such offense was known to the law. The judge denied the motion, and the defendant excepted. The facts relating to this question are stated in the opinion. The defendant asked the judge for certain rulings, the first of which was that upon all the evidence the jury must find the defendant not guilty of the offense charged. The judge refused to make this and other rulings requested by the defendant. The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs.

W. R. Scharton & J. F. Barry, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

SHELDON, J. The first and most serious objection to the validity of this indictment is that it charges the offense to have been com-

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mitted "during the three months next preceding the finding of this indictment." This is a proper mode of averment, and would authorize a conviction upon proof that the crime charged had been committed during the period of time thus defined. R. L. c. 218, § 32. But the indictment was found on the first Monday of August, that is on August 6, of the year 1910. The acts charged did not constitute an offense at common law, but were made criminal by St. 1910, c. 424, § 5, which was approved on April 22, and so did not go into effect until May 22, 1910. R. L. c. 8, § 1. The defendant is charged with having committed the alleged acts during the time between May 6 and August 6, 1910, but his acts were not criminal until May 22 of that year. He contends that this allegation of time is a material averment, descriptive of the offense and fixing its identity, and therefore that the indictment is fatally defective in a substantive averment as to an essential ingredient of the offense charged. *Commonwealth* v. *Pray*, 13 Pick. 359. *Commonwealth* v. *Elwell*, 1 Gray, 463. *Commonwealth* v. *Adams*, 4 Gray, 27. And see *State* v. *O'Donnell*, 81 Maine, 271; *Collins* v. *State*, 58 Ind. 5; *Collins* v. *State*, 5 Tex. App. 37; *Brewer* v. *State*, 5 Tex. App. 248. He relies also upon the well-settled principle that an acquittal or a conviction upon a charge that a continuing offense has been committed during a specified time will be a bar to another prosecution for a like offense during another specified time which includes any part of the time named in the first charge. *Commonwealth* v. *Robinson*, 126 Mass. 259, and cases cited. *Commonwealth* v. *Dunster*, 145 Mass. 101. *Commonwealth* v. *Goulet*, 160 Mass. 276.

We do not doubt that the offense here charged may be continuous in its nature, although it may be that it could be committed also by a single act of deriving one's support in part from the prohibited source. *Commonwealth* v. *Pray*, 13 Pick. 359, 362. *Wells* v. *Commonwealth*, 12 Gray, 326. *King* v. *Dixon*, 10 Mod. 335. So far as an offense is charged, it is accordingly one continuous offense, constituted both by a series of acts and by a duration of time; and when the time and the acts are properly proved, the offense is single and indivisible. *Commonwealth* v. *Robinson*, *ubi supra*. Perhaps it may be that before the passage of St. 1899, c. 409, now contained in R. L. c. 218, the question here presented would have admitted only of an answer favorable to the defendant's

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contention. But the defect claimed to exist in the indictment is not that it does not fully set forth a criminal offense, but that it charges too much. The defendant is none the less charged with guilt during the period after May 22, that he is charged also with having done the acts stated before that day, when they did not constitute a crime. And it is provided by the statute to which we have referred that "an indictment shall not be quashed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars as provided in section thirty-nine." R. L. c. 218, § 34. It has not been claimed in argument that this indictment does not fully meet these requirements. It tells the defendant exactly what charges are made against him. It is not suggested that he needed any bill of particulars to enable him to prepare his defense.

In many of the cases on which the defendant relies the charge was of the commission of an offense on a day named and "on divers other days and times" within an interval stated, where the prosecution could not be maintained for anything done on the first day specified, and no other day was particularly charged, as was held to be necessary. See for example *State* v. *O'Donnell*, 81 Maine, 271; *Collins* v. *State*, 58 Ind. 5; *State* v. *Rollet*, 6 Iowa, 535. But under our statute no averment of time is needed, unless that is an essential element of the crime charged; R. L. c. 218, § 20; and in any event the question is whether the indictment complies with the requirements of § 34 above quoted.

The precise claim made by the defendant has been overruled in some other jurisdictions. *Nichols & Janes' Case*, 48 Va. 589. *State* v. *Way*, 5 Neb. 283. *Territory* v. *Ashby*, 2 Mont. 89. In each of these cases the indictment was for an offense which by its nature might be continuous. In each case, the charge was that the offense had been committed during a time which began before the passage of the statute that created the offense charged, and included a period subsequent to that passage; and in each case it was held that the indictment was good and would support a conviction upon proof that the acts charged had been done within the time averred and since they had been made criminal by the taking effect of the statute. We might not be willing to adopt all the reasoning

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of some of these cases; but the result reached in them seems to us to have been good. The same doctrine in principle, as to the possibility of subdividing an alleged interval of time, has been held in some well considered cases in Maine, in which an integral part of the time charged could not be proved, either because of the operation of a statute of limitations or by reason of a change in the statute which fixed the penalty for the offense charged. *State* v. *Pillsbury*, 47 Maine, 449. *State* v. *Cofren*, 48 Maine, 364. *State* v. *Dorr*, 82 Maine, 212. In one of these cases there was indeed a doubt expressed whether a conviction could have been sustained for the time following the change in the statute; but in the case at bar we do not deem that distinction material.

We do not intend to throw doubt upon the doctrine that a charge with a *continuando* of an offense continuous in its nature is a charge of one indivisible offense, where that particular offense could have been committed and that penalty incurred during the whole of the time stated. Where, however, this is not the case, courts have found no insuperable difficulty in apportioning the charge and rejecting as immaterial that part of the averment which charged no crime. Besides the cases already cited, see *State* v. *Woodman*, 3 Hawks, 384. It is difficult on principle, where an offense is well charged by apt and sufficient words, to say that the charge is vitiated by the addition of other averments, not themselves inconsistent with the truth of that charge and being wholly without legal operation upon the guilt or innocence of the defendant or upon his ability to make his defense against the real and only charge contained in the indictment. *Commonwealth* v. *Pray*, 13 Pick. 359, 361. *Wells* v. *Commonwealth*, 12 Gray, 326. *Commonwealth* v. *Lord*, 147 Mass. 399. *State* v. *Cassety*, 1 Rich. 90. *State* v. *Kirkpatrick*, 63 Iowa, 554. Nor can any fair and just distinction be made between merely additional independent averments and a single averment, itself including a good charge but partly ineffective by reason of having too wide a scope.

Accordingly we are of opinion that this objection to the indictment cannot be sustained.

The statute is plainly constitutional; *Commonwealth* v. *Pear*, 183 Mass. 242; and the indictment sufficiently charges the defendant's guilt. *Commonwealth* v. *Donovan*, 170 Mass. 228, 235. *Commonwealth* v. *Rogers*, 181 Mass. 184, 190. It was not neces-

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sary to negative in advance such possible defenses as might be set up by the defendant. *Commonwealth* v. *Hart*, 11 Cush. 130.

The other reasons assigned in the motion to quash the indictment appear to have been waived and need not be considered. That motion rightly was overruled.

The only other exception which has been argued by the defendant is that taken to the refusal of the judge to rule that upon all the evidence the jury must find the defendant not guilty. It is manifest that this ruling could not have been made. We need not recapitulate the evidence. It abundantly warranted a conviction. It has not been argued before us that if the woman from whose prostitution the defendant derived support was his wife, his conduct was any the less a violation of the statute or any the less criminal.

Exceptions overruled.

JOHN HETHERINGTON AND SONS, LTD., *vs.* WILLIAM FIRTH COMPANY.

Suffolk. March 22, 1912. — June 4, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Report. *Damages*, In contract. *Contract*, Construction.

After long hearings of an action of contract by an auditor and by a judge of the Superior Court without a jury, involving great expense to both parties, exceptions by the defendant to rulings of the judge of the Superior Court were sustained and a new trial was ordered, confined to the question of damages. Upon a motion by the plaintiff asking for a ruling as to the scope of the inquiry at the second trial, which would have involved an extended investigation at the trial into complicated facts, a judge of the Superior Court made an interlocutory order narrowing the inquiry so that the trial would be brief, and reported the question raised by his order for determination by this court under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Held*, that under the peculiar circumstances the report was made properly under the statute.

Moot, speculative or subsidiary questions should not be reported to this court for determination under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5.

An English manufacturer of machinery and a Boston merchant made a contract in writing providing for the sale of the manufacturer's goods in the United States and Canada by the merchant during a period of five years. The contract covered

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two main subjects, one the purchase and sale of the machinery, which was its dominant purpose, and the other the maintenance of an American agency. There was a provision that the merchant should "not during the continuance of this agreement be engaged or interested in the sale" of any other machinery in the territory named "similar to or made and used for the same purpose as" the English manufacturer's, and the manufacturer agreed to sell in the described territory only through the merchant. The merchant broke the contract by selling other goods similar to the English manufacturer's, and, in an action by the manufacturer against him, it having been decided that the manufacturer could not recover damages for the loss of prospective profits under the aspect of the contract which contemplated purchases and sales because of the uncertain character of such damages, it was *held* further, that the provisions of the contract, confining the purchases and sales contemplated by the contract to the parties to it, was not a main or independent agreement, but was subsidiary and supplementary to the dominant agreement relating to purchases and sales, and therefore that no damages could be recovered for the breach of such provision since none were recoverable for breach of the agreement to which it was subsidiary.

CONTRACT for breach of a contract in writing which, as afterward modified orally, established terms under which the defendant was to sell certain machinery of the plaintiff in the United States and Canada. Writ dated November 15, 1901.

The case first was heard in the Superior Court without a jury, by *Raymond*, J., who found for the plaintiff. Exceptions of the defendant were sustained and a new trial, confined to the issue of damages, was ordered in a decision reported in 210 Mass. 8, where the entire contract is quoted.

Thereafter and before a second trial of the case the plaintiff moved that an interlocutory order be made directing that the case "stand for trial for the assessment of damages including any damages that may be shown to have resulted from a loss of business and profits arising through the defendant's competition in engaging in the sale of other machinery similar to the plaintiff's contrary to its stipulation in the contract declared on, and failing to carry out its undertaking to sell efficiently and to appoint representatives to travel regularly in the United States and Canada, visiting the existing mills and districts in which mills may be erected for the purpose of procuring orders for all the various machines made by the plaintiff."

The motion was heard by *Pierce*, J., who ordered that the case "stand for trial only for the assessment of damages suffered by the plaintiff in expenses incurred by it in establishing new arrange-

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ments to carry on the business which the defendant undertook to do under its contract with the plaintiff," and, being of the opinion that the question of law involved in the order ought to be determined by this court before any further proceedings were had in the Superior Court, reported the case for such determination.

S. J. Elder, (*F. E. Bradbury* with him,) for the defendant.

J. B. Warner, (*R. S. Warner* with him,) for the plaintiff.

RUGG, C. J. After the decision in this case in 210 Mass. 8, the Superior Court entered an order to the effect that the "case stand for trial only for the assessment of damages suffered by the plaintiff in expenses incurred by it in establishing new arrangements to carry on the business which the defendant undertook to do under its contract with the plaintiff." This order was entered in consequence of a wide variance between the parties as to the extent and elements of damage open in the new trial. Being of opinion that the question of law involved in this interlocutory order ought to be determined by the fall court before further proceedings, the judge reported the case for that purpose under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. This case has been once tried before an auditor, and once before a judge of the Superior Court sitting without a jury, questions of law arising upon which have been decided by this court. Each trial of the facts has been long, and necessarily must have been conducted at great expense to the parties. The scope of inquiry as to damages at the new trial, if in accordance with the order entered in the Superior Court, will be narrow and a trial comparatively brief, while if it is as broad as contended by the plaintiff extended investigation into complicated facts may be involved. Under these peculiar circumstances the report upon such an order is made properly under the statute. Considerable discretion is conferred upon judges of the Superior Court in reporting cases before they are ripe for final judgment. If this discretion should be too generously exercised, and if moot, speculative or subsidiary questions are reported, they would not be considered. The statute does not permit a return to the prolific power given to the Superior Court by St. 1869, c. 438, which was found by practice so extremely inconvenient that it was repealed by St. 1878, c. 231. *Terry* v. *Brightman*, 129 Mass. 535. *Bearce* v. *Bowker*, 115 Mass. 129. *Noble* v. *Boston*,

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111 Mass. 485. The question presented by this report is fundamental and vital in a new trial, and its decision now is in the interest of economy of time and expense.

The plaintiff contends that under the previous decision it is permitted to recover all damages suffered by reason of the defendant's breach of contract, save only that the subject of prospective profits is barred, while the defendant asserts that only the reasonable expenses incurred in re-establishing an American agency is open. This diversity of view requires an examination of the posture of the case when it was here before. The plaintiff then had prevailed in the Superior Court with a substantial finding in its favor. The defendants pressed various exceptions. The only ones now material were grouped under the single subject, "loss of profits on sales of machinery occasioned by the act of the defendant." 210 Mass. 21. This was the only aspect of damages argued by counsel. Narrowly construing its duty, the court perhaps might have confined itself to that phase, and left the rest of the field of damages undisposed of. But this would not have conduced to a new trial based upon the judgment of this court as to the elements of damage which would be proper subjects of inquiry. It is the practice under such conditions to indicate the general principles which should guide the conduct of the new trial, and thus afford all the aid in its power to end litigation promptly in accordance with law. So far as such principles are stated they become the law of the case. *Boyd* v. *Taylor*, 207 Mass. 335. Where all the other factors have not been directly argued and where the court does not undertake to state with definiteness the precise rule, a new phase not specifically covered by the earlier decision may be presented. The two points broadly decided before were that this contract was of such a character that loss of gains on future business could not be recovered, while expense of re-establishing the agency in America could be recovered. Reference was made in the statement of the contract in that opinion to the stipulation that the defendant should appoint representatives to travel, and should not sell other machinery, so that these elements did not escape the attention of the court. There is force in the argument that inferentially it follows that breach of these provisions of the contract was held not to be a foundation for damages, although nothing further is said distinctly about them in the opin-

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ion. But without placing the decision on this ground, we treat the matter now raised as open to the plaintiff.

It requires no citation of authorities to support the proposition that under very many conditions a contract not to compete is valid and enforcible and substantial damages may be recovered for its breach, and that the evidence which may warrant recovery of such damages need not be specific and detailed, but may be comprehensively definite. Within the shadows which may fall on the broader line of a general rule of damages, each case must be treated by itself. In this case, as was pointed out before, the contract covered two main subjects, one the purchases and sales of machinery which appears to us plainly to be the dominant purpose of the agreement, and the other the maintenance of an American agency. There is the further clause, for breach of which it is contended now that damages may be recovered, that the defendant "shall not during the continuance of this agreement be engaged or interested in the sale in the United States of America or the Dominion of Canada of any other spinning machinery similar to or made and used for the same purpose as" that of the plaintiff, and a like requirement that the plaintiff shall do its American business exclusively through the defendant. This paragraph confining purchases and sales for the designated territory to the parties appears to be not a main or independent purpose of the parties, but one subsidiary to their ruling design. It is supplementary of the positive agreement as to purchases and sales, negative in its terms and protective of the prevailing feature of the contract. The chief aim of the contract being purchases and sales of machinery, when this came to an end whatever was dependent and incidental to it fell also. Although the breach of an agreement not to compete gives rise to an action, when it is separate and disconnected from other parts of a contract, the connection in which this clause appears and its relation to the governing intent and subject of this contract gives no right to damages when none exist as to that main subject. *Troy Laundry Machinery Co.* v. *Dolph*, 138 U. S. 617. *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122. *Francisco* v. *Smith*, 143 N. Y. 488. *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280, 294.

What has been said applies also to the agreement to have agents travel through the United States and Canada. That also was a

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supplementary agreement. It follows that the damages at a new trial are to be limited to the expenses incurred by the plaintiff in establishing its new American agency, and that the order of the Superior Court was right.

Order affirmed.

JULIA J. LARSON *vs.* BOSTON ELEVATED RAILWAY COMPANY.
CANUTE B. LARSON *vs.* SAME.

Suffolk. March 29, 1912. — June 4, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Elevated railway. *Damages*, In tort.

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained when the plaintiff was a passenger in a car on a train of the defendant from the hand of the plaintiff being caught between a sliding door of the car and the casing into which the door opened, if it appears that as the train was approaching a station the plaintiff left her seat and walked to the door of the car when a lurch of the car threw her against the door and that by an involuntary act she put her hand upon the casing of the door to steady herself, the question whether the plaintiff was in the exercise of due care is for the jury.

The fact that a car of a train on an elevated railway as it was nearing a station gave a severe and sudden lurch, which caused a passenger who was preparing to leave the car to put his hand involuntarily upon the casing of the door for support, although it is not in itself evidence of negligence in the operation of the train, is evidence of notice to the servant of the railway company in charge of the door that passengers who had come or were coming to the door for the purpose of leaving the car might be thrown against it and involuntarily might seize any support within their reach, so as to make it the duty of such servant to refrain from opening the door until he was assured that no one would be hurt by it.

In an action for personal injuries against a corporation operating an elevated railway, where the superintendent of the elevated division of the defendant's railway was called as a witness by the plaintiff and testified, without exception, that certain oral instructions were given to the guards and brakemen employed upon the defendant's elevated trains, it was *said* that the question how far such evidence would have been admissible, against exception, for the purpose of showing negligence of the defendant was an open one.

In an action by a married woman against a corporation operating an elevated railway for personal injuries sustained from the plaintiff's hand being caught between a sliding door of a car of the defendant and the casing into which the door opened, there was evidence that at the time of the accident the plaintiff was pregnant and that by reason of the accident a miscarriage occurred, from the results of which the plaintiff became very weak, and that about six months after the accident it was found that she was suffering from tuberculosis. There was testimony

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of an expert that the plaintiff's weakened condition was very favorable to the development of tuberculosis. The jury found in answer to a special question that the tuberculosis was directly attributable to the injury received by the plaintiff in having her hand caught in the car door. *Held*, that, if the tuberculosis was induced by the plaintiff's weakness caused by the accident without any other intervening cause, it was a proper element of damage, and that, if at the time of the plaintiff's injuries there were germs of tuberculosis in her system, and if the direct consequence of her injuries was to lessen her general health and to reduce her power of resistance to the effects of the germs and solely by reason thereof the tuberculosis which had been latent in her system became developed into an existing disease, the jury would have a right to find that the tuberculosis was a direct and immediate result of the plaintiff's injuries and to assess damages for it.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained by her on September 18, 1909, when she was a passenger in a car of a train of the defendant at the Northampton Street station in Boston of the elevated railway operated by the defendant, from the plaintiff's hand being caught between the sliding side door of the car and the casing into which the door opened, by reason of the alleged negligence of the servants of the defendant, and the second action by the husband of the plaintiff in the first action for consequential damages. Writs dated October 12, 1909.

In the Superior Court the cases were tried together before *Pratt*, J. The plaintiff in the first case (who hereafter is referred to as the plaintiff) did not contend that there was any defect in the condition of the door or that the manner in which the train came to a stop was in itself evidence of negligence in the operation of the train. The plaintiff testified as follows: "Well, when the train was nearing Northampton Street I got up from my seat to get to the door and when I got to the door the car gave an awful sudden and severe jolt and threw me right against the door and I put my right hand out to save me and my hand went right into the door."

One Pasho, the superintendent of the elevated division of the defendant's railway, called as a witness by the plaintiff, testified that the doors on the elevated trains were operated by air with a valve at the end of the car and that the brakemen or guards on the trains controlled the air which shut the doors. He testified that brakemen and guards were instructed to look at the part of the car in which a door was before opening it, and that they were

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instructed not to open or close the doors before the train had stopped. This witness, against the objection and exception of the defendant, testified, from a book of rules of the defendant "for the government of employees," which was in force at the time of the accident, to the following rule:

"Gates and Doors." Rule 91. "Every precaution must be taken to avoid accidents. Gates and side doors must never be opened so that passengers can board or leave a moving train, nor must trains ever be started until gates and side doors have been properly closed and all necessary signals given. In all cases of doubt adopt the safe course. Great care must be used in operating gates and doors so that passengers will not be struck or their clothing caught by same.

"Passengers should be induced to leave car by the side doors and enter by the end doors, provided doors and gates stop abreast of the same place on station platform. Passengers wishing to leave train must be allowed to do so before others are permitted to board."

The second paragraph of the rule numbered 99 in the book was admitted in evidence, subject to the defendant's exception. It was as follows: "Always face the door when closing it in order to avoid shutting it against a person's hand or clothing; never slam the door but use care to open and shut it noiselessly."

The plaintiff and her husband both testified that the door opened while the train was moving. There was evidence that the guard or brakeman who operated the door that injured the plaintiff opened it without looking at the door.

There was evidence that before the accident the plaintiff was strong and well, weighing one hundred and fifty-two pounds, that at the time of the accident she was pregnant, that by reason of the accident a miscarriage occurred, from the results of which the plaintiff became very weak and was reduced in weight to one hundred and twenty pounds, and that about six months after the accident it was found that she was suffering from tuberculosis.

The hypothetical question put to the witness Dr. Hawes and admitted against the defendant's exception, referred to in the opinion, concluded as follows: "I want to know whether that condition of a woman which I have pictured to you would be a favorable condition for the development of tubercular germs in her system?"

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The witness answered, "I should consider that with those facts stated as you have given them to me, that the condition would be very favorable to the development of consumption." The examination continued as follows: "Q. Why? A. For the simple reason that the woman's resistance must necessarily have been lowered by the sickness which she went through. — Q. Now assume that that sickness had been eliminated and that she had continued a well, strong woman, I want to know whether under those conditions you would have expected the tubercular germs would have developed into the tuberculosis which you found? A. I can think of absolutely no reason why tuberculosis should develop under those circumstances."

At the close of the evidence the defendant asked the judge to rule that the plaintiff was not in the exercise of due care and that there was no evidence of negligence on the part of the defendant, and also asked for many other rulings, including a ruling that the tuberculosis from which the plaintiff suffered was due to a new and independent cause for which the defendant was not responsible and for which there could be no recovery in this action. The judge refused to make these rulings. He submitted to the jury certain special questions, which with the answers to them were as follows:

"1. Was the door in which Mrs. Larson's hand was caught opened while the car was in motion?" The jury answered "Yes."

"2. Is Mrs. Larson's tuberculous affection directly attributable to the injury she received by having her hand caught in the car door?" The jury answered "Yes."

"3. As compensation for all damage sustained by Mrs. Larson, — aside from that due to her tuberculous affection, — the jury award the sum of $500."

"4. As compensation for all damage sustained by Mrs. Larson the jury award the sum of $3,000."

The jury returned a general verdict for the plaintiff in the sum of $3,000; and the defendant alleged exceptions.

C. Brewer, for the defendant.

D. E. Hall, (*F. J. V. Dakin* with him,) for the plaintiffs.

SHELDON, J. The jury had a right to find that the female plaintiff was in the exercise of due care and had not assumed the risk of the accident which happened. The fact that she had left her

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seat and walked to the door of the car as it approached the station was not decisive against her. *Barden* v. *Boston, Clinton & Fitchburg Railroad,* 121 Mass. 426. *Worthen* v. *Grand Trunk Railway,* 125 Mass. 99. Her putting her hand upon the door was an involuntary act done to steady herself when the lurch of the car threw her against the door. This presented a question for the jury.

There was also evidence of negligence on the part of the defendant. It is not claimed that the lurch of the car, however violent and unexpected, constituted such negligence; but the jury might find that it should have operated as a warning to the defendant's servant in charge of the door that passengers who had come or were coming to it for the purpose of leaving the car might be thrown against it and involuntarily might seize any support within their reach. If the person so in charge was the brakeman at the rear of the car, as reasonably might have been inferred, the argument in favor of the plaintiff was strengthened. *McGlinchy* v. *Boston Elevated Railway,* 206 Mass. 7. The reasoning in that case is closely applicable to the case at bar.

The admission in evidence of the defendant's rules 91 and 99 was excepted to. That part of rule 91 which states that "passengers should be induced to leave car by the side doors" was plainly competent. It tended to show the necessity of care in opening the door in question, by which passengers were expected to go out. Nor was the rest of the rule clearly inapplicable to the case presented, especially as the exceptions do not show at what stage of the trial the rules were offered and admitted. *Crowley* v. *Boston Elevated Railway,* 204 Mass. 241, 246. Only the second paragraph of rule 99 was admitted. This was not incompetent for similar reasons. Both of these rules on their face applied to all the doors of the car.

The testimony as to oral instructions or directions given by the defendant to its servants as to the operation of the doors was admitted without exception, and it is not necessary to consider the question which was left undecided in *Crowley* v. *Boston Elevated Railway, ubi supra.* It was perhaps intimated in *Lindenbaum* v. *New York, New Haven, & Hartford Railroad,* 197 Mass. 314, 324, that published rules might be modified by oral instructions; but the question whether the doctrine of *Stevens* v. *Boston Elevated Railway,*

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184 Mass. 476, firmly settled as it now is in our decisions, should be extended to cover all oral instructions given by a superior officer or an instructor to an inferior servant, has not been passed upon by the court, and is not now presented.

We cannot say that Pasho's testimony on cross-examination and on his re-direct examination had as matter of law the effect of annulling his testimony as to the oral instructions about which he testified. It was for the jury to settle the fact. *Cameron* v. *New England Telephone & Telegraph Co.* 182 Mass. 310. *Tupper* v. *Boston Elevated Railway*, 204 Mass. 251. The jury could believe his earlier rather than his later statements. He was not allowed to say what doors or what cases the rules in evidence were intended to cover. This was right. The rules were not ambiguous, and spoke for themselves. Any oral modifications or explanations of the rules given to the operators were not excluded.

It was not wrong to admit the hypothetical question put to Dr. Hawes. The question could properly include what material facts the counsel deemed to be proved or expected to be proved, and need not include others. It would be for the jury to say what facts were proved. *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169. *McCarthy* v. *Boston Duck Co.* 165 Mass. 165, 166. *Burnside* v. *Everett*, 186 Mass. 4, 6.

If the plaintiff's tuberculosis had been directly caused by this accident, it would of course have been an element of damages. So, if it were induced without any other intervening cause by her weakened condition or her loss of blood, itself directly caused by the accident, the same would be true. And if at the time of her injuries there were germs of tuberculosis in her system, and if the direct consequence of her injuries was to lessen her general health and cause weakness and reduce her power of resistance to the toxic effect of these germs, and if solely by reason thereof the tuberculosis which had been merely latent in her system became developed into an existing disease, as on the evidence the jury were warranted in finding, they would then have a right to find that the tuberculosis was a direct and immediate result of her injuries and to assess damages therefor. *Coleman* v. *New York & New Haven Railroad*, 106 Mass. 160, 178. *Derry* v. *Flitner*, 118 Mass. 131, 133. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 211. *Rooney* v. *New York, New Haven, & Hartford Railroad*,

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173 Mass. 222. *Sullivan* v. *Boston Elevated Railway*, 185 Mass. 602. *Weber* v. *Third Avenue Railroad*, 12 App. Div. (N. Y.) 512. *Dickson* v. *Hollister*, 123 Penn. St. 421. *Baltimore City Passenger Railway* v. *Kemp*, 61 Md. 74. *Beauchamp* v. *Saginaw Mining Co.* 50 Mich. 163. *Louisville & Nashville Railroad* v. *Jones*, 83 Ala. 376. *Louisville, New Albany & Chicago Railway* v. *Falvey*, 104 Ind. 409, 426. *Seckinger* v. *Philibert & Johanning Manuf. Co.* 129 Mo. 590. *Neff* v. *Cameron*, 213 Mo. 350, 365. *Ross* v. *Great Northern Railway*, 101 Minn. 122. *People's Railway* v. *Baldwin*, 7 Pennewill (Del.) 383. *Crane Elevator Co.* v. *Lippert*, 63 Fed. Rep. 942. If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries, or by the operation of some other subsequent and independent cause, then, even though the disease would not have developed and manifested itself but for her physical condition having been weakened and her power of resistance diminished by those injuries, it well may be that she could recover no damages for that sickness and its consequences. *Raymond* v. *Haverhill*, 168 Mass. 382. *Snow* v. *New York, New Haven, & Hartford Railroad*, 185 Mass. 321. *Scheffer* v. *Railroad*, 105 U. S. 249. But no such claim as that last suggested was made here. The defendant's contention was and is that the evidence as to tuberculosis was wrongly admitted and that no damages should be allowed by reason thereof; and that contention cannot be sustained. The judge clearly and plainly instructed the jury to allow no such damages unless they were satisfied that the tuberculosis was the direct and immediate result of the plaintiff's original injuries. As to this, the defendant's only exception was to the refusal of the instructions for which it asked. These requests, so far as not given, were properly refused.

The other exceptions either have been waived or require no discussion.

Exceptions overruled.

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WILLIAM H. SANDERS *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Suffolk. December 13, 1911. — June 17, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by a machinist against a railroad corporation for personal injuries sustained when in the employ of the defendant from an iron boiler head falling upon the plaintiff while it was being hoisted under the direction of a superintendent of the defendant, if it appears that the plaintiff was an experienced machinist, but that he knew nothing about the job on which he had been put to work when the accident happened and that he had told the superintendent so, that he followed the directions of the superintendent, and that, although he told the superintendent that he thought there was danger, he relied on the superintendent's assurance that it was "all right" and that they had done "hundreds of those kind of work on this machine," and if there is evidence that the method adopted by the superintendent to raise the boiler head was an improper one, the questions whether the plaintiff was in the exercise of due care and whether he assumed the risk of injury, as well as the question of the defendant's negligence, are for the jury.

TORT for personal injuries sustained by the plaintiff on March 21, 1907, while in the defendant's employ from the falling of an iron boiler head which was being hoisted to the table of a boring machine. Writ dated December 7, 1907.

In the Superior Court the case was tried before *DeCourcy*, J. The boiler head was about seven feet in diameter and was over an inch thick. In the middle of it was a round hole about two feet in diameter with a three-inch flange around it. The hole was intended to be closed by an iron door and the work to be done on the boring machine was the drilling of holes for the hinges of this door. The method used to raise the boiler head was to fit a piece of timber about thirty inches long into the hole and then to place a chain around the piece of timber and hoist the boiler head by a tackle and fall made fast to a hook on a crane above the boring machine. While being hoisted under the direction of the defendant's superintendent the boiler head tipped over and fell on the foot of the plaintiff.

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The verdict and the questions raised by the exceptions of both parties are stated in the opinion.

The case was submitted on briefs.

D. H. Coakley, R. H. Sherman & W. M. Hurd, for the plaintiff.

G. L. Mayberry, for the defendant.

MORTON, J. This is an action of tort to recover for personal injuries received while in the defendant's employ. The declaration was in four counts. With the consent of the plaintiff the presiding judge directed a verdict for the defendant on the second and fourth counts. Subject to the plaintiff's exceptions he directed a verdict for the defendant on the third count. The case went to the jury on the first count which alleged negligence on the part of the superintendent. There was a verdict for the plaintiff. The case is here on exceptions by both parties.

We take up first the defendant's exceptions. They are that the plaintiff was not entitled to recover, that he was not in the exercise of due care and assumed the risk, and that there was no evidence of negligence on the part of the defendant. We think that these were all questions of fact for the jury. At the time of the accident the plaintiff was forty-eight years old and was an experienced machinist. But, as he told Wieberg, the superintendent, he did not know anything about the job on which he had been put to work by Wieberg, and on which he was working when he was injured. In procuring the stick and putting it into the boiler front he did as directed by Wieberg, and in assisting to hoist up the boiler front and put in on the boring machine he acted under Wieberg's directions. Although he thought, as he told Wieberg, that it was "quite a dangerous place," he had a right to rely on Wieberg's assurance that, as testified to by the plaintiff, "It is all right. We done hundreds of those kind of work on this machine." In view of his inexperience in regard to the particular kind of work that he was doing and of the fact that he was acting under Wieberg's directions, the question of his due care and assumption of the risk was for the jury. *Griffin* v. *Joseph Ross Corp.* 204 Mass. 477. *Di Bari* v. *J. W. Bishop Co.* 199 Mass. 254. *Reardon* v. *Byrne,* 195 Mass. 146. It was for the jury to say whether the method in which Wieberg undertook to raise the boiler head was or was not a proper way. It could not be ruled as matter of law that there was no evidence of negligence on the part of the defend-

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ant, or that the plaintiff could not recover. The case was rightly submitted to the jury on the first count.

We pass to the plaintiff's exception to the ruling of the presiding judge directing a verdict for the defendant on the third count. This count alleged that the plaintiff was set to work in an unsafe place with unsuitable and unsafe appliances, and without due warning or instructions. There was no evidence of any defect in the place where the plaintiff was set to work or in the apparatus that was furnished. The plaintiff took the appliances and apparatus as he found them when he entered the defendant's employment, except as to defects which could not be discovered by the exercise of ordinary care and diligence, and no duty rested on the defendant to furnish better ones. *Miszoian* v. *Taft*, 206 Mass. 227. *McDonnell* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 538. There is nothing to show that the machinery or appliances were not suitable for the use for which they were designed. The negligence consisted, as already pointed out, in the improper manner in which the superintendent undertook to raise the boiler head. It follows that there was no error in directing a verdict for the defendant on the third count.

Defendant's exceptions overruled; plaintiff's exceptions overruled.

EDUARDO GRANARA *vs.* DAVID H. JACOBS & another.

Suffolk. March 19, 20, 1912. — June 17, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability. *Practice, Civil*, Ordering verdict.

In an action by an employee of one engaged in the alteration and reconstruction of a building, to recover for injuries received by reason of the breaking of a staging which had been laid across an elevator well and upon which the plaintiff was standing while at work under the direction of a superintendent of the defendant, one count of the declaration was at common law and alleged as the cause of the injury that the defendant had caused the staging to be constructed in a negligent manner and of unsafe and improper materials and insufficient strength. At the trial there was no evidence that the staging was constructed by the defendant, that it was furnished by him for the plaintiff to use, that the material of which it was constructed was furnished by the

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defendant, or that the defendant had adopted it for the use of his employees or had directed the plaintiff or others of his employees to use it, and a verdict was ordered for the defendant. *Held*, that the verdict was ordered properly.

In an action by an employee against his employers to recover for personal injuries caused by the breaking of a staging upon which the plaintiff was standing while performing duties which he had been directed by the defendants' superintendent to perform, a count of the declaration alleged that the accident occurred "by reason of a certain defect in the condition of the ways, works and machinery of the defendants, connected with and used in the business of the defendants, which arose from or had not been discovered or remedied owing to the negligence of the defendants or of some person or persons in the service of the defendants and entrusted by the defendants with the duty of superintending the construction of said work, and whose sole or principal duty was that of superintendence." There was no evidence that the staging was erected by the defendants or that it was built with materials furnished by them or had been adopted by them for use by their servants. There was evidence that it was used occasionally by the defendants' employees and that, when it broke, the plaintiff was on it by the direction of a superintendent of the defendants. *Held*, that the count charged a defect in the ways, works or machinery of the defendants under St. 1909, c. 514, § 127, cl. 1, and that there was no evidence that the staging was a part of the ways, works or machinery of the defendants.

The declaration in an action against an employer by an employee for personal injuries contained only a count at common law and a count under St. 1909, c. 514, § 127, cl. 1. At the trial there was no evidence to support the allegations of the declaration and the trial judge ordered a verdict for the defendant and reported the case for determination by this court, judgment to be entered for the defendant if the order was correct; otherwise, judgment to be entered for the plaintiff for a stipulated sum. In this court the plaintiff argued that there was evidence of negligence of a superintendent of the defendant which would entitle the plaintiff to recover under cl. 2 of the section of the statute. *Held*, that such a contention need not be considered, because the order of the trial judge must be taken to have been made in view of the allegations of the declaration.

TORT for personal injuries caused by the breaking of a plank upon which the plaintiff, while in the employ of the defendants, was standing while performing work to which he had been assigned by a superintendent of the defendants. Writ dated June 30, 1906.

The declaration contained two counts. The first count alleged as the cause of the accident "that the defendants caused the said staging to be constructed in so negligent a manner and of such unsafe and improper material that the said staging was not of sufficient strength." In the second count it was alleged that the plaintiff's injuries were caused "by reason of a certain defect in the condition of the ways, works and machinery of the defendants, connected with and used in the business of the defendants, which arose from or had not been discovered or remedied owing to the negligence of the defendants or of some person or persons in the service

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of the defendants and entrusted by the defendants with the duty of superintending the construction of said work, and whose sole or principal duty was that of superintendence."

In the Superior Court the case was tried before *Brown*, J. There was evidence tending to show the following facts:

At the time of the accident the defendants were engaged in the alteration and reconstruction of a building on Atlantic Avenue and Tileston Square or Alley in Boston. An elevator well about ten feet square had been cut through the floors of the building at one side of it and directly against the outer wall on the alley side. A hole had been cut in this outer wall at the street floor directly opposite the elevator well. This hole was later to become a door to the well. The street floor was about three feet above the level of the sidewalk at this point. Across the elevator well a plank had been placed on the level of the street floor, parallel with the outside wall of the building and close against it, and two other planks some distance apart extended at right angles from the first plank to the opposite side of the well. Both ends of the first plank rested on the floor of the building and extended a little over a foot upon it at each end. The cross planks at one end rested upon the first plank and were against the outer wall of the building. At the other end they extended two or three feet out upon the street floor of the building.

The plaintiff was a laborer in the defendants' employ. A foreman of the defendants called upon him to assist in swinging into position an iron column which was to form one corner of the elevator well and which was lying in the alley, and directed him to "go and help Peter Finochetti" fix some tackle. Finochetti was upon one of the cross planks above described.

While the plaintiff and Finochetti were upon the plank, another employee of the defendants, one Solari, came on to one of the other planks and started to cross the elevator well upon it, and as he was doing so, the planks, with all three men, fell to the cellar.

One of the defendants, called by the plaintiff, testified that the defendants were doing the masonry work on the building, and that the plastering, whitewashing and carpentering were being done by other contractors to whom the defendants had sublet that part of the job; that the defendants had a large supply of planks on the job, all of which were marked, and that

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none of the planks across the elevator well belonged to the defendants.

There was no other evidence as to who owned the planks in question.

At the close of the evidence the judge ordered a verdict for the defendants and reported the case for determination by this court, judgment to be entered for the defendants if the verdict was ordered rightly; otherwise, judgment to be entered for the plaintiff in the sum of $1,250.

R. W. Nason, for the plaintiff.

W. H. Hitchcock, for the defendants.

SHELDON, J. The plaintiff was not entitled to recover upon his first count. That was at common law, and charged the defendants with negligence in the construction of the staging, the fall of which caused the plaintiff's injuries. But there was no evidence that the staging was constructed by the defendants or furnished by them for the plaintiff to use, or that the planks used in its construction were supplied by them. The plaintiff offered no such evidence, and that given by the defendant who testified tended merely to show that the staging was put up by other contractors with their own planks and for their own purposes. Nor could it have been found that the defendants had adopted the staging for the use of their servants or had directed the plaintiff or others of their servants to use it. *Kennedy* v. *Spring*, 160 Mass. 203. *O'Connor* v. *Rich*, 164 Mass. 560. *Brady* v. *Norcross*, 172 Mass. 331. *Thompson* v. *Worcester*, 184 Mass. 354. For any negligence of their superintendent in sending the plaintiff or others upon it, they would not be liable at common law. *Moody* v. *Hamilton Manuf. Co.* 159 Mass. 70. *Flynn* v. *Salem*, 134 Mass. 351. *Grebenstein* v. *Stone & Webster Engineering Co.* 205 Mass. 431, 437.

The second count charged a defect in the ways, works or machinery of the defendants under R. L. c. 106, § 71, cl. 1; St. 1909, c. 514, § 127, cl. 1. But such a structure as this, put up by a third person with his own materials for his own purposes, was not a part of the defendants' ways, works or machinery, even though occasionally used by their servants. *Adasken* v. *Gilbert*, 165 Mass. 443. *McKay* v. *Hand*, 168 Mass. 270. *Nichols* v. *Boston & Maine Railroad*, 206 Mass. 463.

There was evidence that the defendants' superintendent told

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the plaintiff to go upon this staging, and it has been argued that the order could have been found to be negligence in the superintendent, for which the defendants would be liable under cl. 2 of the statute already cited. It would be hard to say that this conduct was negligent. No outward visible defect appeared on the planks; there was no crack or knot on any of them; they were simply discolored, not apparently weakened, from prior use. It was Solari's hurried going upon the planks that caused the fall, and there is no evidence that the superintendent told him to take that path. But this question need not be considered; for no such cause of action is stated in the declaration. The whole averment thereof fails, if there was no defect in the defendant's ways, works or machinery, as we have seen that there was not. We must take it that the ruling of the judge was made with the declaration before him and in view of its averments. *Wallace* v. *New York, New Haven, & Hartford Railroad,* 208 Mass. 16. The doctrine of *Ridenour* v. *H. C. Dexter Chair Co.* 209 Mass. 70, 78, frequently has been applied to sustain a ruling made at a trial, but not, so far as we have found, for the purpose of reversing a ruling apparently made upon the issues raised by the pleadings. The ruling which was reversed in *Kellogg* v. *Boston & Maine Railroad,* 210 Mass. 324, was made upon "all the evidence" merely, without reference to the specific averment of the declaration.

Judgment for the defendants.

JOSEPH BULDRA *vs.* RUTH HENIN.

Hampden. May 20, 1912. — June 17, 1912.

RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant. Negligence, Of one owning real estate, In use of gas.

Although a landlord who orally has let an apartment to a tenant is not obliged to put it in tenantable condition and may repudiate before performance a promise which after the letting he has made to that effect, if he goes ahead and by his servants or agents carries out such a promise, he is liable for damages resulting from negligence on the part of his servants or agents in so doing.

At the trial of an action against a landlord by a tenant of an apartment fitted for the use of gas, for injuries resulting from an explosion alleged to have been caused

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by negligence of a plumber employed by the defendant to place caps upon open pipes in the apartment, there was evidence tending to show that the plumber had informed the plaintiff's daughter that he had put caps on the pipes and that she had so informed the plaintiff previous to the accident; and there was no evidence that there was an odor of escaping gas or that there was any other fact to warn the plaintiff that the plumber had not done his work properly. It appeared that the explosion was caused by the plaintiff going with a lighted match into a hall where gas had collected because the plumber had not placed a cap on one of the pipes. *Held*, that the question of the plaintiff's due care was for the jury.

TORT for personal injuries caused by an explosion of gas in an apartment which the defendant had let orally to the plaintiff, the plaintiff alleging that the explosion was caused by gas which had escaped by reason of the negligence, described in the opinion, of a plumber engaged by the defendant. Writ dated March 3, 1910.

In the Superior Court the case was tried before *Sanderson*, J. There was evidence that, being informed by an employee of the gas company that caps were needed upon certain pipes where gas fixtures had not been installed, the plaintiff went to the office of Dr. Henin, the defendant's husband, who was admitted to have been her agent. There was evidence, which was admitted *de bene* and afterwards absolutely subject to an exception by the defendant, that, Dr. Henin being absent from the office, Jacob Henin, his brother, who was in charge of his office, telephoned him at the plaintiff's request with regard to the need of the caps. One Bergman, a plumber, testified that he was instructed by Dr. Henin to put on the caps.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. There is no evidence of any negligence on the part of the defendant, or those having authority to act for him, entitling the plaintiff to recover.

"3. There was no evidence that the plaintiff was in the exercise of due care."

"8. Even if the defendant did agree to repair, did repair, and was negligent in so doing, and the injury resulted therefrom, she is not liable if the undertaking to make repairs was gratuitous, and the plaintiff cannot recover unless it appears that such repairs

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were undertaken in pursuance of a legal obligation to make them."

"10. There is no sufficient evidence of any such agency on the part of Jacob Henin the brother of defendant's husband, or such authority in him for her in the premises, as to entitle the plaintiff to recover.

"11. There is no sufficient evidence of any ratification by the defendant or her husband of any act or conduct of Jacob Henin as to make anything he may have done in the premises binding upon her, or to entitle the plaintiff to recover in this action."

"18. If there was any agreement between the plaintiff and Dr. Henin that he would repair the gas pipes or put them in shape for use, that agreement was made after the commencement of the plaintiff's tenancy, and was merely gratuitous, and even if negligently done by the defendant the plaintiff is not entitled to recover.

"19. If the jury find that the defendant, acting by Dr. Henin, her agent, undertook to put the caps on the gas pipes at the request of the plaintiff on January 1st, 1910, this was merely a gratuitous act and imposed no liability on the defendant."

The jury found for the plaintiff in the sum of $391.48. In response to a question asked orally of the foreman of the jury by the presiding judge after the verdict was returned, the foreman stated in substance that the jury found that the order for the plumber to place the caps came from Dr. Henin.

The defendant alleged exceptions.

The case was submitted on briefs.

C. G. Gardner & R. W. Stoddard, for the defendant.

C. L. Young, J. L. Doherty & W. G. Brownson, for the plaintiff.

DeCourcy, J. When the plaintiff moved into the defendant's new house there were openings in the gas pipes through which the gas, when turned on at the meter, would escape into the rooms. A plumber was engaged to put caps upon these openings, and his workman negligently left one of them unclosed, in consequence of which occurred the explosion that injured the plaintiff. Under the special answer of the jury it must be taken as established that the order to the plumber came from Dr. Henin, whose general agency for the defendant was admitted; consequently the tenth and eleventh requests relating to the agency of his brother Jacob Henin become immaterial. And the jury were warranted in finding, by

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the testimony of the plumber Bergman, that the order to do the work was given by Dr. Henin personally.

The court, at the defendant's request, fully instructed the jury upon the limited duties owed by a landlord to a tenant under our law, and confined the defendant's liability to a negligent performance of work which she had promised and undertaken to do. Although the contract of letting imposed upon Mrs. Henin no obligation to put the premises into tenantable condition, or to make repairs, and she was at liberty to repudiate a promise to do so, nevertheless when she did undertake to carry out a promise to put caps upon the openings in the gas piping, even though there was no consideration for her promise, she became liable to the plaintiff for a failure to perform the work with reasonable skill and care. The requests numbered 2, 8, 18 and 19 were rightly refused. *Gill* v. *Middleton*, 105 Mass. 477. *Dix* v. *Old Colony Street Railway*, 202 Mass. 518. *Galvin* v. *Beals*, 187 Mass. 250.

The issue of the plaintiff's due care was for the jury, and we cannot say that their finding in his favor was not warranted by the evidence. There was testimony that the plumber notified the plaintiff's daughter that he had put caps on the pipes, and that she had so informed her father previous to the accident. There was no evidence of the odor of escaping gas, or of any other fact calculated to warn the plaintiff that the plumber had not done his work properly.

Exceptions overruled.

JAMES A. FARQUHAR *vs.* CANADA-ATLANTIC AND PLANT STEAMSHIP COMPANY, LTD.

Suffolk. January 8, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Corporation, Dividend, Promoter's agreement. *Contract.*

An agent of promoters of a corporation purchased all the corporation's capital stock and part of its property, and as payment received the promoters' notes, retaining the stock as security, and the agent and the promoters became the controlling stockholders of the corporation. They then doubled the capital stock of the corporation, one half of the increase being given to the agent for

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further security for the payment of the promoters' notes, and substantially all the rest of the increase being given to a trustee to be held by him subject to an agreement between the promoters and the agent which in part provided that the promoters should manage the business of the corporation and should apply its net earnings monthly toward payment of their notes to the agent, and that, after those notes were paid, the stock should be distributed as the promoters might agree. A dividend was declared by the corporation, and on demand of the agent it was paid to him by the treasurer of the corporation in performance of the agreement between the agent and the promoters. Over a year previous to the declaration of the dividend one of the promoters had borrowed a sum of money from one to whom he promised to assign as collateral security all interest which he might obtain in the corporation or its stock, and two years and three months after the dividend had been paid to the agent certain shares of stock in the corporation and all dividends due thereon were assigned at such promoter's request by the trustee above described through others to the promoter's personal creditor. Over three years later the assignee demanded the payment to him of the dividend above described, and, payment being refused, brought an action against the corporation therefor. *Held*, that by their agreement the promoters, including the plaintiff's assignor, had appropriated the dividend in question with the rest of the corporation's net earnings to the payment of their notes to the agent; that, although the corporation had not assented to the agreement formally, it had not prevented its being carried out by the payment of the dividend to the agent, and that it was too late for the plaintiff's assignor or any one claiming under him to contend successfully that he was entitled to the dividend.

MORTON, J. The defendant company is a Canada corporation, and on September 20, 1904, declared a dividend of six and a quarter per cent on its capital stock, payable October 1. This is an action to recover $750, the amount of the dividend on one hundred and twenty shares of stock. The case was tried by a judge * without a jury. The judge found for the defendant and the case is here on exceptions by the plaintiff to the finding and to the refusal of the judge to give certain rulings that were requested.

The plaintiff was not the owner or holder of the stock at the time that the dividend was declared, and did not become a holder or owner of it until on or after January 15, 1907. He claims through an alleged assignment to him of the dividend made September 1, 1910, by one McIlreith at the request of one Charles E. Pye. On June 5, 1903, Pye and others, whom we shall call the promoters, entered into an agreement with one Perry, whereby Perry purchased in their interest the entire capital stock of the defendant company, then consisting of two thousand shares of the par value

* *McLaughlin*, J.

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of $100 each, and certain real estate and wharf property in Halifax occupied by the defendant company. The promoters gave their notes to Perry for $285,000, payable in one year, Perry retaining the stock as security therefor. As part of the scheme the capital stock was increased from two thousand shares to four thousand shares, and bonds to the amount of $300,000 were issued. One thousand shares of the increase were issued to Perry as additional collateral security for the notes given to him by the promoters, and the bonds were deposited by him with the International Trust Company as mortgagee and trustee with liberty to the promoters to sell the same or any part thereof and have the proceeds applied towards the payment of their notes to Perry. The remaining one thousand shares, less seventy shares issued to the directors and one hundred and twenty shares issued to G. B. Bussey and James A. Young, were placed in the hands of McIlreith in trust for the benefit of the promoters and for other purposes set out in the trust agreement. The one hundred and twenty shares conveyed to the plaintiff constituted a part of the eight hundred and ten shares thus left in the hands of McIlreith, and were shares to which Pye was entitled according to the agreement between him and the other promoters. They were transferred on December 12, 1906, by McIlreith, at the request of Pye, to Frederick J. Dagget, and by him, on January 15, 1907, at Pye's request, were transferred to the plaintiff. The agreement between Perry and the promoters provided amongst other things that the management of the steamship company should be undertaken by the promoters and that they should deposit monthly with the International Trust Company all the net earnings of the steamship company and that the net earnings should be applied monthly towards the payment of the notes given by them to Perry. Upon payment to Perry in full at any time within one year of the notes aforesaid, he was to transfer to the promoters the stock and bonds, or so much thereof as remained unsold, in such proportions as they might agree upon. At the time when this agreement was entered into the promoters and Perry constituted all of the stockholders except the four Canadian stockholders holding ten shares each as required to qualify them as directors. Perry claimed that under the provisions of the agreement relating to the application of the net earnings he was entitled to the dividend that

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was declared, and the same was paid over to him by the treasurer of the company. Perry had previously, in September, 1903, while acting as treasurer of the company, drawn $25,000 from the company without any formal vote on the part of the directors or the executive committee, of which he was one, though with the assent of the other two members of the committee, and applied it towards the payment of the notes held by him. Shortly before September 20, 1904, under the advice of counsel, he returned to the company the amount so drawn. It appeared that on or about June 1, 1903, the plaintiff lent Pye $5,000, taking his notes therefor, and that Pye promised the plaintiff that he would assign to him as collateral security therefor any and all interests which he might obtain in the company or its stock. It could be found, if material, that Pye procured the transfer of the one hundred and twenty shares and the assignment of the dividend to be made to the plaintiff pursuant to the promise thus given by him to the plaintiff. So far as appeared no demand for the payment of the dividend in suit or claim to the same was made by Pye or any one representing him, until September 7, 1910, shortly before the date of the writ. There was nothing to show that any objection was made by Pye or any one representing him to the payment to Perry of the dividend that was declared in September, 1904.

We think that the ruling and finding in favor of the defendant were right. The agreement between Perry and the promoters operated so far as the promoters were concerned, as an appropriation and assignment of their interest in the net earnings of the company to the reduction of their indebtedness to Perry. If any of the net earnings belonging to them were not so appropriated, they would be liable in damages to Perry for the breach of their contract and the damages recovered would be the amount of net earnings that were not so appropriated. Although the company did not formally assent to the appropriation and assignment, that did not prevent the agreement from taking effect as between the parties to it, and, payment having been made by the company to Perry in accordance with the terms of the agreement without objection, it is now too late for Pye or one claiming under him as the plaintiff does, to contend successfully that he is entitled to the dividend. What effect, if any, the agreement would have upon the rights of other stockholders it is not necessary to con-

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sider. As between the parties to it we see nothing illegal in the agreement. The rulings requested * were rightly refused except so

* The requests for rulings which were refused except so far as stated as to each one, were as follows:

"1. On all the evidence judgment should be entered for the plaintiff in the sum of $1023.60, being the amount of the dividend with interest to date.

"2. On all the evidence judgment should be entered for the plaintiff in the amount of $781.83, being the amount of the dividend with interest from date of demand.

"3. On all the evidence judgment should be entered for the plaintiff in the amount of $781.83, being the amount of the dividend with interest from the date of the writ.

"4. Money earned by a corporation is corporate property and not the separate property to the stockholders, unless and until distributed among them by the corporation. [This request was given.]

"5. The members of a corporation have no right to contract among themselves as individuals as to the disposal of the net earnings of the company.

"6. At the time of the agreement of June 5, 1903, the parties of the second part were not stockholders in the corporation and could not lawfully contract as to the disposal of its earnings.

"7. The agreement of June 5, 1903, in so far as it attempts to dispose of the net earnings of the corporation is illegal and of no effect.

"8. The agreement of June 5 is an illegal agreement in that it attempts to dispose of the earnings of the Canada-Atlantic and Plant Steamship Company by a personal agreement among persons not yet stockholders and it is of no effect as far as this case is concerned.

"9. Granting that the agreement of June 5, 1903, was not illegal, it expired one year from its date.

"10. Granting that the said agreement of June 5, was not illegal, it means that if the notes of said Perry were paid in full in or within one year from its date then the said Perry should transfer to the parties of the second part in such proportions as they may agree upon the shares of capital stock held by him and any of the bonds in his possession, and if said notes were not paid in full, the shares of the capital stock and the bonds remaining in his possession should belong to the said Perry free and clear of any claims of the parties of the second part and there would be no liability on the notes referred to therein.

"11. The agreement of June 5, 1903, had no effect on the dividend which was declared on September 20, 1904.

"12. McIlreith, the assignor of the plaintiff in this case, was the owner of the stock on October 1, 1904, and was entitled to the dividend made payable on that day.

"13. The assignment made by the said McIlreith and sued on in this case is valid and carries the dividend which was made payable on October

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far as granted. There is nothing in the contention that the agreement did not warrant the application of the earnings to the payment of the notes after the end of the year, or in the contention that the dividend belonged to McIlreith. He held the one hundred and twenty shares for the benefit of Pye and it was for Pye to say so far as these shares were concerned how the earnings or dividends should be disposed of.

Exceptions overruled.

J. E. Young, for the plaintiff.
W. M. Richardson, for the defendant.

CHARLES F. STONE & another, executors, *vs.* GEORGE B. HASKELL.

Suffolk. January 9, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Mortgage, Of real estate: foreclosure.

At the trial of an action of contract for a balance due on a note secured by a mortgage of real estate after a sale in foreclosure of the mortgage, it appeared that the mortgage authorized the mortgagee or his assigns to purchase at the foreclosure sale, that the formalities required by the mortgage were complied with, that the mortgagee procured the attendance of several persons who he had reason to believe would bid, that the defendant knew of the sale but made no effort to attend it or to procure others to do so, that the sale was held inside a house on a January 10, that no auctioneer's flag was displayed, and that the mortgagee bid at the sale for a person to whom the property was struck off. There also was evidence tending to show that the selling price was all that the premises reasonably could be expected to bring, and that in cold or stormy weather sales sometimes were held indoors. There was no evidence that the facts, that no flag was displayed and that the sale was indoors, operated to the prejudice of the mortgagor. *Held*, that findings were warranted that the mortgagee exercised good faith and did all he was bound to do to protect the interests of the mortgagor.

MORTON, J. This is an action to recover the balance alleged to be due upon a mortgage note after applying to it the proceeds of a foreclosure sale under the mortgage. The trial judge * found

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1, 1904." [As to this request the judge stated: "The thirteenth request is granted so far as it purports to allege the validity of the assignment; the request that the assignment carried the dividend is denied."]

* The case was heard by *McLaughlin*, J., without a jury.

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for the plaintiffs and the case is here on exceptions by the defendant to the refusal of the court to rule that the fair market value of the mortgaged premises was $6,000, and that on all the evidence the plaintiffs were not entitled to recover.

1. The fair market value was a question of fact. There was evidence warranting a finding that it was less than $6,000. The presiding judge also took a view. It cannot be said that the judge was bound to find that the fair market value was $6,000. The ruling requested was therefore rightly refused.

2. The mortgage expressly authorized the mortgagee or his assigns to purchase at the foreclosure sale. The action of the plaintiff Stone, one of the mortgagee's executors, in bidding at the sale for one Beal, to whom the premises were struck off, was therefore warranted by the mortgage. The premises were sold for $4,500, subject to unpaid taxes of $142.91. One witness, a real estate broker, testified that the fair cash market value was $4,000. There was evidence of actual sales of property similarly situated in the vicinity at about the same price as that for which this property was sold. This would warrant a finding that the premises brought all that they reasonably could be expected to bring. The sale was advertised as required in the mortgage and took place at the time and place specified in the notice. The plaintiff Stone procured the attendance of several persons who he had reason to believe would bid. The defendant knew of the sale but did not himself attend or make any effort so far as appears, to get others to do so. The sale was in the house and no flag was displayed. But it was the tenth of January and there was evidence that in cold or stormy weather sales were sometimes held in the house. There was also evidence that sometimes a flag was not displayed. The fact that no flag was put out and that the sale was in the house is not shown to have operated in any way to the prejudice of the defendant. There is nothing to show that the plaintiffs did not exercise good faith in making the sale and do all that they were bound to do to protect the interests of the defendant, or that the presiding judge was not warranted in so finding.

Exceptions overruled.

W. A. Abbott, for the defendant.

S. E. Duffin, for the plaintiffs.

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MARIA J. MURPHY, administratrix, *vs.* BAY STATE WINE AND SPIRIT COMPANY.

Suffolk. January 9, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Assault. Agency. Evidence, Presumptions and burden of proof.

In an action by an administrator against the proprietor of a bar room for injuries to the plaintiff's intestate, which resulted in his death, caused by an assault committed by two bartenders of the defendant, the only question was whether the evidence would warrant a finding that the assault was committed by the bartenders in the course of their employment. There was evidence that the intestate had been drinking and was under the influence of liquor, that while he was standing at the bar taking a drink in this condition one of the bartenders came from behind the bar and struck him on the head with a bottle and that immediately afterwards the other bartender took hold of him by his clothing and ran him out of the room. The first bartender after he had struck the intestate went back behind the bar. There was nothing to show any ill will on the part of the bartenders toward the intestate. A verdict was ordered for the defendant. *Held,* that by drawing reasonable inferences of fact it could have been found that in ejecting the intestate the bartenders were acting within the scope of their duties in the preservation of order, and that on such a finding the defendant would be liable for their acts done in the performance of this duty, even if they used unnecessary force. *Held, also,* that if the facts were regarded as showing two separate assaults instead of a continuous one in which both bartenders participated, it was unnecessary to decide whether the evidence would warrant a finding that the first bartender was acting within the scope of his authority, because at any rate the plaintiff would be entitled to go to the jury in regard to the assault committed by the second bartender.

The burden of proof may be sustained by the drawing of reasonable inferences from facts which appear in evidence.

MORTON, J. The plaintiff's intestate was taking a drink in a saloon belonging to the defendant when he was assaulted by two bartenders in the employ of the defendant and forcibly ejected from the saloon, receiving injuries which caused his death. This action is brought to recover for the injuries so received. At the close of the plaintiff's evidence the presiding judge * ruled that she could not recover, and the plaintiff duly excepted. The case

* *Sherman,* J.

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is here on report; if the exceptions are sustained, judgment is to be entered for the plaintiff for $5,000.

The question is whether the evidence would warrant a finding that the assault was committed by the bartenders in the course of their employment. We think that it would. The only witness who testified to the assault said that Murphy, the intestate, had been drinking. He "would not say he was either drunk or sober. He was not swearing or fighting." Just before the assault the bartenders were behind the bar attending to their work and Murphy was standing at the bar taking a drink, in a condition which could be found to have rendered him an undesirable patron. One of the bartenders came from behind the bar and struck Murphy on the head with a bottle, and immediately thereafter the other bartender "took hold of Murphy by the collar and seat of his pants and run him out of the bar room." The bartender who struck him went back behind the bar after the assault. It could be found, we think, that in ejecting Murphy the bartenders were acting in what they supposed to be for the interest of their employer in removing from the bar room a person under the influence of liquor. This could be found to be a reasonable if not the only reasonable explanation of their conduct. In the absence of anything to the contrary the preservation of order in the bar room would or could be found to be incidental to, if not fairly within their duties as bartenders. While the burden of proof is upon the plaintiff to show that what was done came within the scope of the authority of the bartenders, reasonable inferences are not to be excluded, but may properly be taken into account in passing upon the question whether there is any evidence warranting a finding in favor of the plaintiff. The bartenders were admittedly in the employ of the defendant, and the assault was committed in a bar room belonging to the defendant, where the bartenders were at work. There is nothing to show that the assault was for the purpose of gratifying any spite or ill will on their part toward Murphy. Even if one of them might have been actuated by ill will, it hardly would seem possible that both of them would be so actuated. The assault took place when Murphy was at the bar taking a drink as a customer in the condition which has been described. As we have said, a reasonable explanation, if not the only reasonable explanation of the conduct of the bartenders was or could be found to be that they

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were acting in the interest of and for the benefit of their employer. If through excess of zeal they misinterpreted the extent to which they properly could go, and used an excess of force, that would not relieve the defendant. Whether, if what took place were to be regarded not as one continuous assault participated in by both bartenders, but as two separate assaults, the evidence would warrant a finding that the first bartender was acting within the scope of his authority we do not find it necessary to consider, since we are of opinion that the evidence in regard to the other assault would require the exceptions to be sustained and the case submitted to the jury. See *Collins* v. *Wise*, 190 Mass. 206; *Howe* v. *Newmarch*, 12 Allen, 49.

In accordance with the terms of the report the entry will be: Judgment for the plaintiff for $5,000.

So ordered.

W. W. Clarke, for the plaintiff.
L. A. Ford, for the defendant.

WALTER M. FISHER & another *vs.* ORESTES T. DOE.

Suffolk. January 10, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Conduct of trial, Election of counts.

At a new trial of an action of contract, after the sustaining of exceptions alleged by the defendant, where the declaration contains two counts and the plaintiff elects to go to trial on the first count and to waive the second, it is within the discretionary power of the presiding judge to deny a motion of the defendant for an amendment of the docket entries for the purpose of showing that the plaintiff at the former trial of the case waived his first count and elected to proceed on the second and to rule that, even if the plaintiff made such an election at the former trial, he shall relieve him from it and allow him to elect to proceed at the new trial on the first count alone.

MORTON, J. Two actions were brought by the plaintiffs against the defendant. The first was for materials furnished directly by the plaintiffs to the defendant, and the second was as the assignees of one Grant for labor and materials furnished by him. The declara-

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tion in each case as originally drawn contained one count. Both cases were referred to the same auditor. The auditor found for the plaintiffs in the first action. In the second action he found that the assignor had furnished labor and materials for which there was a balance due from the defendant, but that the plaintiffs were not entitled to recover on their declaration as it stood, for the reason that that was on an account annexed, whereas the labor and materials were furnished by Grant, as he found, under a special contract which he had not performed. On the coming in of the auditor's report the plaintiffs amended in the second action by adding a count setting forth that the contract was completed, and that there was a balance due as found by the auditor. The cases came on for trial and were tried together. In the first action the jury returned a verdict for the plaintiffs in the sum found due by the auditor. In the second case the presiding judge, subject to the defendant's exceptions, directed a verdict for the plaintiffs on the second count. The defendant's exceptions were sustained. The case is reported in 204 Mass. 34. The second case, which is this case, came on for trial again, the first one having been settled in the meantime. At this trial the plaintiffs elected to go to trial on the first count and waived the second count. There was a verdict for the plaintiffs and the case is here on the defendant's exceptions.

The first exception was to the refusal of the presiding judge * to allow the docket entries in regard to this action to be amended so as to show that at the former trial the plaintiffs had elected to proceed on the second count, as bearing on the question whether the first count had been waived by the plaintiffs. There was also an instruction requested to the effect that the first count had been waived. The judge refused to allow the amendment and ruled that even if the plaintiffs had elected at the former trial he should relieve them from any election that he had made, and refused to instruct as requested. The whole matter was within the discretion of the presiding judge and, even if the manner in which he exercised his discretion was subject to exception, we see nothing to show that his discretion was wrongly exercised or that the instruction requested was wrongly refused. See *Holst* v. *Stewart*, 161

* *Bell, J.*

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Mass. 516; *Grebenstein* v. *Stone & Webster Engineering Corp.* 205 Mass. 431; *Gott* v. *Judge of Superior Court,* 42 Mich. 625.

The remaining exception was to the refusal of the presiding judge to direct a verdict for the defendant. The ruling asked for was based on the contention that Grant built the house under contract for a specific sum and that he had not performed his contract according to its terms and was not therefore entitled to recover. The plaintiffs contended that Grant was employed by the defendant without any express contract, and in answer to a question submitted to them by the presiding judge the jury so found. Plainly the issue thus presented was one of fact, and the instruction requested was rightly refused.

Exceptions overruled.

J. E. Hannigan, (*H. T. Richardson* with him,) for the defendant.

W. M. Noble, for the plaintiffs.

EFFIE WALKER *vs.* UNITED ORDER OF THE GOLDEN STAR, INC.

Suffolk. January 10, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Fraternal Beneficiary Corporation.

Where a by-law of an incorporated fraternal beneficiary order, conducting its business on the lodge system, provides that a member suspended by reason of non-payment of an assessment to the collector within thirty days from notice of it shall be reinstated on payment of the assessment within the next thirty days, the collector, in the absence of any rule or by-law to the contrary, by agreement with a delinquent member may make such payment in his behalf, and such payment, if made in good faith and without any intent to defraud or injure the order, will operate to reinstate the member as if made by the member himself.

Where a by-law of an incorporated fraternal beneficiary order provides, that a member suspended by reason of non-payment of an assessment within thirty days from notice of it shall be reinstated on payment of the assessment within the next thirty days, such a payment made in good faith within the last named period, in the absence of any requirement of good health as a condition of reinstatement, will operate to reinstate the member although when it was made he was suffering from an injury which later caused his death.

MORTON, J. The defendant is a fraternal benefit insurance order conducting its business under the lodge system. The plain-

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tiff is the beneficiary in a certificate of insurance for $2,000 issued to her husband Marcellus J. Walker, by the defendant. The insured died on May 22, 1909, and this is an action to recover the amount of the insurance. The case was tried by a judge of the Superior Court* without a jury and the court found for the plaintiff. The case comes here on exceptions by the defendant to the refusal of the judge to give certain rulings that were requested, and to the admission of certain evidence.

The certificate was issued upon the condition that the "member complies in the future with the Laws, Rules and Regulations now governing the said Commandery and Fund, or that may hereafter be enacted by this Order to govern said Commandery and Fund;" and also upon the further condition "that said member is in good standing in this Order, at the time of his death; and . . . that the suspension, disconnection or expulsion of said member shall work an immediate forfeiture of all claims of said member on the Benefit Fund of the Order, also, the forfeiture of the claims of the beneficiaries named in this Certificate." The by-laws contain the following: "All members shall have thirty days from the date of the notice calling an assessment, issued by the Grand Commander and Grand Recorder, in which to pay said assessment to the Collector and shall be suspended from the Order by nonpayment within said time; they shall be reinstated provided they make payment within the next thirty days, but shall be disconnected from the Order by nonpayment within said second period of time." Notice of an assessment was issued on April 1, 1909. The insured did not pay the assessment within thirty days.

The plaintiff contends that pursuant to an agreement with her husband, the collector of the lodge at Needham, to which her husband belonged, paid or advanced the amount of the assessment for him before his death during the second period of thirty days, and that the insured was thereby reinstated, and was in good standing at the time of his death.

The case turns on the question whether the assessment was paid as thus contended before the death of the insured. This would seem to be largely a question of fact. The presiding judge found that it was paid, and the evidence clearly warranted such a finding.

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* *Bell, J.*

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The collector testified that there was a meeting of the lodge on Tuesday evening, May 18, and that she then paid for the plaintiff's husband the assessment which had been called on April 1. Books kept by her and the card of the insured were produced showing the entries made by her of the payment of the assessment on that date. One of the books was objected to, but we do not see why it was not admissible. No objection was made to the other book into which the original entries on the book that was objected to were posted. Conflicting statements said to have been made by the collector in regard to the alleged payment were testified to by the president of the defendant corporation and by the clerk and another witness. It is possible, however, that they were reconcilable on the theory indicated by the presiding judge in his memorandum, that at the time when they were made the collector was thinking of the date when she received payment from the plaintiff of what she had advanced to pay the amount due from the insured, which was May 23, after the death of the insured, rather than of the date on which she paid the assessment into the lodge for him. It was for the presiding judge to give such weight to the testimony of the collector as he thought it entitled to, and he found that "on the whole . . . the balance of the evidence . . . [was] . . . in favor of the plaintiff's claim." There was nothing in the by-laws, or in the certificate of insurance, or in the nature of the defendant order, or in the office which the collector held, to prevent her from paying the assessment for the insured, pursuant to an understanding between him and her to that effect. *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1. *White* v. *Connecticut Fire Ins. Co.* 120 Mass. 330. *Chickering* v. *Globe Mutual Life Ins. Co.* 116 Mass. 321. There was evidence tending to show that the collector was accustomed to advance and pay assessments for members, and for them to reimburse her later, and that this was known to and understood by members and officers of the order. The collector had done this many times for Walker and for others. The fact that the defendant is a fraternal insurance order does not, in the absence of any rule or by-law to the contrary, prevent a collector from advancing or paying assessments for other members. Indeed, to do so in a meritorious case would seem to be in harmony with the spirit of the order. If made in good faith and without any intent to defraud or injure the order, such payments had the same effect as if made by the insured himself.

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The by-laws expressly provided that the assessments should be paid within thirty days, but if not, a period of grace of thirty days more was given, during which the insured could make payments. A payment so made operated of itself, without anything more, to reinstate the insured in good standing as a member of the order. This was the construction which the evidence would warrant a finding that officers and members had placed upon the by-law and which they were justified in giving to it. In the absence of any requirement of good health as a condition of reinstatement, it cannot be held that the insured was not entitled to reinstatement and was not a member in good standing at the time of his death because suffering at the time from an injury which later caused his death. *Van Houten* v. *Pine*, 11 Stew. 72.

The collector was properly allowed to testify to the understanding between her and the insured as to the payment of assessments for him.

We see no error in regard to the rulings or refusals to rule.

Exceptions overruled.

The case was submitted on briefs.

W. B. Grant, for the defendant.

O. E. Dunham, for the plaintiff.

D. T. CORMIER *vs.* OSSIAN H. BROCK.

Middlesex. January 11, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Amendment. *Contract*, Implied in law: common counts. *Interest.*

Under R. L. c. 173, §§ 48, 52, the Superior Court may allow a suit in equity originally brought as an action at law, and changed by amendment into such suit, to be amended again into an action at law, with an appropriate change of parties, "to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought."

A contractor, who is unable to show complete performance of a building contract, may be found to be entitled to recover on a *quantum meruit* on the finding of an auditor that the plaintiff had endeavored in good faith to perform his contract and substantially had done so, although the auditor allowed the defendant a number of deductions on account of variations and omissions and inferiority of work and material.

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An action at law on a building contract, made by the plaintiff's assignor with the defendant, was amended into a suit in equity to compel the architect to give a final certificate for the balance due on the contract and to reach the interest of the defendant in a certain partnership, and afterwards such suit was amended back into an action at law on a *quantum meruit* to recover the money earned by a substantial performance of the contract, striking out all the defendants except the original defendant and substituting for the name of the assignee as plaintiff the name of his assignor, suing for the benefit of the assignee. On evidence warranting such a finding it was found by a judge, who heard the case without a jury, that the plaintiff had shown a substantial performance of the contract and was entitled to recover on the *quantum meruit*. *Held*, that the plaintiff was entitled to interest from the date of the writ in the original action at law, the cause of action having been the same throughout, and the suing out of the writ having operated as a demand for the sum that finally was found to be due.

MORTON, J. The first question is whether after the case of Dix *v.* Brock had been amended from an action at law into a bill in equity the Superior Court had authority to allow it to be amended back again into an action at law, substituting the name of Cormier, the assignor of Dix, for that of Dix as plaintiff, and striking out all of the defendants except Ossian H. Brock. The action as originally brought was an action at law upon a building contract entered into between Cormier, the assignor of Dix, and the defendant Ossian H. Brock. After the action was entered the plaintiff Dix moved to amend it into a bill in equity for the purpose of reaching the defendant Brock's interest in the partnership of Brock Brothers, of which he was a member, and of compelling the architect to give a final certificate of the balance due under the building contract. With Ossian H. Brock there were joined as defendants in the writ that was originally sued out, his brothers Halliburton D. and Frank E. Brock, the architect Harry D. Joll and the mortgagees Edward Jackson and Charles Almy. The Charles River National Bank and the Cambridge Safety Deposit and Trust Company were summoned as trustees. The motion to amend was allowed and the pleadings completed, and the case went to a master. The master found that the architect was justified in refusing a final certificate because of variations from the contract, but he also found that the plaintiff was entitled to recover on the contract the fair value of the labor and materials furnished. He further found that Brock had sufficient property so that it would be unnecessary to resort to his interest in the partnership. The defendant Brock, whom we shall speak of as the defendant,

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filed exceptions to the master's report. These were sustained, and the bill was ordered to be dismissed "unless within twenty days the plaintiff files a motion to change to an action at law in the name of Cormier as plaintiff, for the benefit of Dix with the assent of Cormier, and said motion is allowed." A motion was duly filed and an interlocutory decree was entered "allowing Dix 'to amend said suit in equity into an action at law upon a *quantum meruit* against the principal defendant, Ossian H. Brock, in the name of D. T. Cormier for the benefit of Dix, upon condition that the bill be dismissed as to all the defendants except Ossian H. Brock, and that on or before July 15, 1907, the plaintiff file his declaration in said cause; that the plaintiff recover no costs to date if he finally prevails in the action at law, and for the payment of costs to the other defendants.'" The decree thus entered was complied with. An auditor was appointed, who after due hearing found in favor of the plaintiff in the sum of $950.05, and in favor of the defendant on a declaration in set-off in the sum of $95.50.

We think it plain that the Superior Court had authority to allow the amendment. The cause of action was the same throughout, namely, What, if anything, the defendant owed Cormier by reason of the building contract which had been entered into between them, and which Cormier alleged had been substantially performed by him. In declaring on the contract and later on a *quantum meruit*, and in amending into equity, this was the cause of action which the plaintiff was seeking to enforce. The court had full power to allow the amendment from equity back again into law and also to allow the amendments as to parties, "to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought." R. L. c. 173, §§ 48, 52. See *George* v. *Reed*, 101 Mass. 378.

The next question is whether the plaintiff is entitled to recover upon a *quantum meruit*. The auditor in dealing with the question whether the contract had been substantially and in good faith performed, sums up, his findings as follows: "While I find that there were some unauthorized changes and omissions, I do not find that they were so inexcusable and important as to prevent the plaintiff from recovering on a *quantum meruit*, making due allowance to the defendant for omissions, changes, and inferiority of material and workmanship." We construe this to mean, when taken in connec-

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tion with other parts of the auditor's report, that the plaintiff had endeavored in good faith to perform his contract and had substantially done so. While the deductions allowed to the defendant on account of variations and omissions and inferiority of work and material are quite numerous, we cannot say as matter of law that the finding by the auditor that the contract had been substantially performed was not warranted. It is to be noted that the master in the equity suit must have come to the same conclusion as the auditor, since he found that the plaintiff was entitled to recover the fair value of the labor and materials furnished.

The last question is whether the plaintiff is entitled to interest from the date of the writ, or from the date of amending from equity back into law, or from the date of the filing of the auditor's report. The court ruled that he was entitled to interest from the date of the writ, and we think that the ruling was correct. The cause of action being the same throughout, the suing out of the writ operated as a demand for the payment of the sum that was finally found to be due. *Jackson* v. *Brockton*, 182 Mass. 26. *Quin* v. *Bay State Distilling Co.* 171 Mass. 283.

In accordance with the terms of the report * the entry must be, judgment for the plaintiff Cormier for the benefit of Dix, for $950.05, with interest from December 30, 1903, and for the defendant Brock on his declaration in set-off for $95.50, with interest from December 30, 1903.

So ordered.

F. J. Carney, (*J. M. McCarthy* with him,) for the defendant.

G. M. Nay, for the plaintiff.

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* The writ in the original action at law was dated December 30, 1903. The amendment into a bill in equity was allowed on February 5, 1904. The case was referred to Henry H. Winslow, Esquire, as master, and was heard on exceptions to the master's report by *Gaskill*, J., who on January 10 and 18, 1907, made the order and interlocutory decree described in the opinion. After amendment into an action at law in compliance with that decree the case was referred to Albert F. Converse, Esquire, as auditor. After the filing of the auditor's report the case was heard by *Fox*, J., who found for the plaintiff in accordance with the findings of the auditor, and reported the case for determination by this court.

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J. WHEELOCK SPRING & another, administrators, *vs.* CITY OF CAMBRIDGE.

Middlesex. January 12, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Tax, Sale. *Contract.*

Under R. L. c. 13, § 44, providing that if by reason of an error in a tax sale "the purchaser has no claim upon the property sold, he may within two years after the date of the deed, offer by writing given to the collector, to surrender and discharge his deed or to assign and transfer to the city or town all his right, title and interest in the premises, as the collector shall elect," and that "upon such surrender and discharge or assignment and transfer, the city or town shall pay to the purchaser the amount which he paid with interest at the rate of ten per cent per annum," it is the duty of the collector upon receiving such an offer to elect within a reasonable time whether he will take a surrender and discharge of the deed or an assignment and transfer of the title, and, if he makes no reply to the offer, his failure to elect within a reasonable time operates as a refusal to accept a surrender of the tax deed or an assignment of the purchaser's title, and the purchaser has the same rights against the city or town that he would have had if there had been an actual surrender or transfer. *It seems* that after such a refusal the right of the purchaser to recover from the city or town would not be affected by his releasing his interest to the owner of the land. In the present action it was found that the plaintiff was in a position at the time of the trial to make a surrender or transfer at the election of the collector and offered to do so.

MORTON, J. The plaintiffs' intestate was the purchaser at a tax sale of certain property sold by the collector of taxes of the defendant city for non-payment of taxes. It subsequently appeared that by reason of error in the sale the intestate had no claim upon the property sold. This is an action to recover under R. L. c. 13, § 44, the amount with interest paid by the plaintiffs' intestate for said property. The case was tried by the court without a jury, and the presiding judge* found for the plaintiffs. The case is here on exceptions by the defendant in regard to rulings that were made and refused by the presiding judge. The same case was before the court in 199 Mass. 1, where the defendant's exceptions were sustained.

* *Schofield*, J. After his resignation the exceptions were allowed by *Pierce*, J.

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The statute provides that the purchaser "may within two years after the date of the deed, offer by writing given to the collector, to surrender and discharge his deed or to assign and transfer to the city or town all his right, title and interest in the premises, as the collector shall elect. . . . Upon such surrender and discharge or assignment and transfer, the city or town shall pay to the purchaser the amount which he paid with interest at the rate of ten per cent per annum." R. L. c. 13, § 44. It appeared and the presiding judge found as a fact that on May 23, 1906, which was within two years from the date of the deed, the plaintiffs, with the widow and the heir at law of the intestate, offered in writing, by a communication addressed to and received by the collector, to surrender and discharge the deed received by the intestate or to assign and transfer to the city as he should elect, all their right, title and interest in the premises. The collector made no reply to the communication thus addressed to and received by him, and on the eleventh day of June the widow caused a letter to be written to him calling his attention to the communication of May 23, and requesting a reply. To this letter no answer was received, and down to the trial which took place on February 9, 1909, the collector made no election and refused at the trial to make an election. On or about July 20, 1906, the plaintiffs assigned to one Eldora M. Aldrich, to whom the premises had been conveyed, any and all sums which they might receive from the defendant city, and on August 6, 1906, concurrently with a deed dated August 4, from Eldora M. Aldrich to William M. Cleveland and Lewis W. Dewey, the plaintiffs and the widow and heir at law delivered to Robert S. Gorham, to be held for the benefit of the grantees in the deed from Eldora M. Aldrich a deed or release dated July 20, 1906, of their interest in the premises. This deed was without any covenants of warranty or seisin or other covenants. At the trial the plaintiffs offered to surrender and discharge the tax deed or to assign and transfer to the defendant city all the purchaser's interest in the premises, thereby, as they claimed, keeping good the offer made May 23, 1906. The presiding judge found as a fact that the plaintiffs were in a position to make good this offer at the election of the tax collector of the defendant city. The judge found and ruled that the time which elapsed from May 23 to June 11 was a reasonable time within which the collector could

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have decided whether to take a surrender and discharge of the deed or an assignment of the purchaser's right, title and interest, and that the time between the letter of June 11 and the conveyance to Gorham on August 6 was also a reasonable time within which the collector could have made his election, and that the defendant had suffered no loss or detriment by reason of the conveyance of the tax title to Gorham. The presiding judge refused to rule as requested by the defendant that the plaintiffs were not entitled to recover, that the offer and tender could not avail them if they were not at the institution of the suit owners of the tax title, and that because of the conveyance which they had made they could not recover; and found as already stated, for the plaintiffs.

We think that the refusal to rule as requested and the finding in favor of the plaintiffs were right. The collector was bound to elect within a reasonable time whether he would take a surrender and discharge of the deed, or an assignment and transfer of the title. The statute intends that he should do so. Otherwise it would be within the power of the collector, by refusing to make an election and to accept a surrender or assignment, to defeat the object of the statute altogether. A failure on the part of the collector to elect within a reasonable time must be regarded as having the same effect so far as the purchaser is concerned as a refusal to accept a surrender of the tax deed or an assignment of the purchaser's right, title and interest in the premises. In such a case the purchaser having offered to surrender or assign, and the collector having refused to accept a surrender or assignment, the purchaser must be held to be in the same position that he would have been in had there been an actual surrender or transfer. The statute contemplates that the purchaser's offer to surrender or assign will be accepted by the collector, but the collector cannot be compelled to take a surrender or transfer, and it would seem to follow that if he refuses to accept a surrender or transfer the right of the purchaser to recover the amount which he has paid for a void conveyance should not be affected thereby. Neither should it be affected by the fact that after a refusal by the collector to accept a surrender or transfer the purchaser has released his interest to the owners of the premises. The tax deed though void constitutes or could be found to constitute a cloud upon the title, and the purchaser should not be required, after having made an

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offer which has been refused, to subject himself to the possibility of proceedings on the part of the owners to compel its removal. Moreover, it having appeared that the plaintiffs were in a position to surrender or assign when their offer was made, it would seem that if as a condition of recovery they were required to discharge or assign, it was sufficient, in the absence of anything to show an election in the meantime by the collector, if they were in a position at the time of the trial, as the judge found that they were, to make a surrender or transfer at the election of the collector and offered to do so. See *Dresel* v. *Jordan*, 104 Mass. 407; *Harriman* v. *Tyndale*, 184 Mass. 534. We see nothing to prevent the plaintiffs from maintaining their action, and we discover no error in the rulings or refusals to rule.

There is nothing in this opinion which is inconsistent with the former opinion. Questions which might arise at a later stage were expressly left open, and the questions now raised were not then before the court and were not passed upon.

Exceptions overruled.

F. M. Phelan, (*J. F. Aylward* with him,) for the defendant.

J. W. Allen, for the plaintiffs.

OLD SOUTH ASSOCIATION IN BOSTON *vs.* CITY OF BOSTON.

Suffolk. March 20, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Old South Association in Boston. Corporation, Charitable. *Tax*, Exemption. *Statute*, Construction. *Damages*, For property taken or damaged under statutory authority.

St. 1877, c. 222, chartering the Old South Association "for the purpose of acquiring and holding the Old South Meeting-House in Boston and the land under and adjacent to the same . . . for public, historical, memorial, educational, charitable and religious uses and none other," gave the corporation "power to take and appropriate to the uses of said corporation, said meeting-house and land or any interest therein," and further provided that "said meeting-house and land shall be exempt from taxation while said meeting-house shall be used for any of the purposes aforesaid." *Held*, that the exemption from taxation both of the land upon which the meeting house stands and of the land adjacent to it continues so long as the meeting house is preserved and used for the purposes of the charter, although the corporation puts the adjacent land to other uses which are

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not inconsistent with those purposes and which by yielding revenue may promote them.

Although, where language in a statute has a plain meaning, such meaning cannot be affected by the character of proceedings before the enactment of the statute, records of such proceedings may be examined to assist in construing language of doubtful import in a statute.

Upon a petition by the Old South Association in Boston, a corporation incorporated under St. 1877, c. 222, for damages sustained by the taking under St. 1902, c. 534, of land adjacent to the Old South Meeting House for the purpose of the construction of the Washington Street tunnel, it was *held* that it was proper for the presiding judge to rule that "the petitioner had a right under its charter to use the land adjacent to the meeting house in the most profitable manner whenever it saw fit to do so for the purpose of producing income to preserve the meeting house and to carry out its other charter purposes and that the jury should assess damages accordingly," and also that "in addition to the damages which would be awarded to an ordinary petitioner this petitioner is entitled to such a sum as will in the opinion of the jury compensate it for that feature or special damage contained in its loss by the taking which is created by the charter exemption from taxation of the space taken."

PETITION, filed on September 6, 1907, under St. 1902, c. 534, § 8, for the assessment of damages sustained by the taking of land lying north of the Old South Meeting House in Boston for the purpose of making an entrance to and an exit from the Washington Street tunnel.

Material portions of the petitioner's charter, St. 1877, c. 222, are as follows:

"An Act to incorporate the Old South Association in Boston, and to provide for the preservation of the Old South Meeting-House.

"Be it enacted, etc., as follows:

"Section 1. The governor of the Commonwealth, the mayor of the city of Boston, the president of Harvard College, the president of the Massachusetts Historical Society, the president of the American Antiquarian Society, and the president of the New England Historic-Genealogical Society, *ex officiis*, and William Gaston, John Lowell, Samuel E. Sewall, Edmund Quincy, Samuel A. Green, Henry Lee, Martin Brimmer and John D. Long, and their associates and successors, are hereby made a body corporate by the name of the Old South Association in Boston, for the purpose of acquiring and holding the Old South Meeting-House in Boston and the land under and adjacent to the same upon the corner of Milk Street and Washington Street in said city, for public, historical, memorial, educational, charitable and religious

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uses and none other, with all the powers and privileges, and subject to all the duties, liabilities and restrictions set forth in chapter sixty-eight of the General Statutes and acts in addition thereto. Said corporation shall have the power to take and appropriate to the uses of said corporation, said meeting-house and land or any interest therein. . . . And said corporation shall also have power, until the foregoing powers are exercised, to take a lease of said meeting-house and land, or the interest so taken, and hold the same thereunder for the purposes aforesaid.

"Section 2. The officers of said corporation shall consist of a board of managers, the number of which shall be fixed by the by-laws, and of which the six first named in this act shall be members *ex officiis*, and two shall be elected annually by the city council of the city of Boston, and the rest shall be elected by the members of the corporation; and said managers shall elect one of their number president, and shall also elect a secretary and a treasurer. All officers shall hold over until others are chosen in their stead. New members may be admitted in such manner as the by-laws shall provide.

"Section 3. Said corporation may make contracts with the Commonwealth for the use of said meeting-house for the annual election sermon, and with the Commonwealth or the city of Boston for its use for any public purposes not inconsistent with the provisions of this act.

"Section 4. Said meeting-house and land shall be exempt from taxation while said meeting-house shall be used for any of the purposes aforesaid, and shall be exempt from any tax for the year eighteen hundred and seventy-seven.

"Section 5. This act shall take effect upon its passage."

In the Superior Court the case was tried before *Fessenden*, J. After the jury had taken a view and before any evidence was introduced, the petitioner asked for the following rulings:

1. "That the petitioner had a right under its charter to use the land adjacent to the meeting house in the most profitable manner whenever it saw fit to do so for the purpose of producing income to preserve the meeting house and to carry out its other charter purposes and that the jury should assess damages accordingly.

2. "That in addition to the damages which would be awarded to an ordinary petitioner this petitioner is entitled to such a sum as

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will in the opinion of the jury compensate it for that feature or special damage contained in its loss by the taking which is created by the charter exemption from taxation of the space taken."

The judge gave the first ruling and refused the second. The trial then proceeded, and the jury returned a special finding of $100,000, representing the petitioner's damage without interest, it having been agreed that interest from the date of the taking should be computed and added by the judge; and, it appearing that that sum had been paid to the petitioner by the respondent, a verdict was ordered for the respondent subject to an exception by the petitioner; and the case was reported for determination by this court, it being agreed that, if the first ruling above quoted was given rightly without the second, the verdict ordered was to stand, but that, if the second ruling should have been given, judgment was to be entered for the petitioner for the sum of $25,000, with interest from the date of the taking.

The case was submitted on briefs.

N. Matthews, W. G. Thompson & R. W. Hale, for the petitioner.

*T. M. Babson,** for the respondent.

RUGG, C. J. The petitioner was organized under St. 1877, c. 222, "for the purpose of acquiring and holding the Old South Meeting-House in Boston and the land under and adjacent to the same upon the corner of Milk Street and Washington Street in said city, for public, historical, memorial, educational, charitable and religious uses and none other." Before 1877 the Old South Meeting House had been given up as a place of worship by the religious society which had occupied it since its erection in 1729. Pursuant to the power conferred by this statute the petitioner acquired title to the real estate thus described.

This petition is brought for the assessment of damages occasioned by the taking of a part of the land lying north of the meeting house for the Washington Street tunnel. The case was submitted to the jury with instructions under which recovery was permitted on the ground that the petitioner "had a right . . . to use the land adjacent to the meeting house in the most profitable manner whenever it saw fit to do so for the purpose of producing income

* Mr. Babson died on March 5, 1912, but the brief which had been prepared by him was submitted in his name.

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to preserve the meeting house." The petitioner contends that it should have been allowed to recover in addition such sum as would "compensate it for that feature or special damage contained in its loss by the taking which is created by the charter exemption from taxation of the space taken."

The charter of the petitioner contains in § 4 a special exemption from taxation in these words: "Said meeting-house and land shall be exempt from taxation while said meeting-house shall be used for any of the purposes aforesaid, and shall be exempt from any tax for the year eighteen hundred and seventy-seven." This exemption from taxation is materially different from that found in the general law at the time it was passed or at any time since. Gen. Sts. c. 11, § 5, cl. 3, as affected by St. 1874, c. 375, § 8 (now St. 1909, c. 490, Part I, § 5, cl. 3). It is plain that the contention of the respondent would be unanswerable, if the rights of the petitioner depended upon the general law. Real estate held by ordinary educational, charitable or religious institutions is exempt from taxation only to the extent that it is appropriated to their distinctive uses. *Amherst College* v. *Amherst*, 193 Mass. 168. *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28. If the Legislature had intended only this exemption, no special provision touching taxation would have been required. But the Legislature meant something more than the general exemption granted to kindred societies. St. 1877, c. 222, took effect on May 11 of that year. Before then the meeting house itself, by special permission of the Legislature, had been leased to the United States for a post-office and utterly abandoned as a place of religious worship, and hence together with the adjacent unoccupied land had become subject to taxation. *Old South Society* v. *Boston*, 127 Mass. 378. Taxes for the year 1877 had accrued before the enactment of the petitioner's act of incorporation. Yet the whole property was exempted expressly from taxation for that year. It is apparent from this, as well as from the provision of § 1 to the effect that the petitioner might lease the meeting house and land before acquiring title thereto, that the exemption from taxation is not grounded upon ownership by a charitable organization, but upon other considerations. The manifold historic incidents connected with the Old South Meeting House and the stirring scenes enacted within its walls have made it a shrine precious beyond price to every lover

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of the Commonwealth and to all who cherish the traditions of liberty under government upon this continent. For reasons of its own the religious society which had owned the building had sold it. It was on the point of being torn down and the land devoted to commercial uses, for which it had become exceedingly valuable. Public-spirited citizens desiring to preserve it as a fountain of patriotic inspiration for future generations raised by subscription a sum of money large in itself, but small compared with the market value of the property. To this end title was taken in the name of Royal M. Pulsifer, and mortgages to the amount of $300,000 were given to secure the balance of the purchase price. It is obvious that the preservation, care and repair of the meeting house as a historical monument under this burden of indebtedness would present a difficult problem.

The extraordinary public interest and popular character of this plan for the preservation of the meeting house is demonstrated by the provisions of §§ 1 and 2 to the effect that the Governor of the Commonwealth, the mayor of the city of Boston, and the presidents of four learned institutions are named among the incorporators, and these, with two elected by the city council of Boston and others chosen by the petitioner, constitute a board of managers; and by the appropriation of $10,000 to the petitioner from the treasury of the Commonwealth, by c. 26 of the Resolves of 1878.

The inference from the grammatical construction of the tax exemption section quoted above is that the property to be acquired by the petitioner is a unit. It is referred to as "said meeting house and land." This evidently means the land more particularly described in § 1 as that "under and adjacent to the same [the meeting house] upon the corner of Milk Street and Washington Street." The exemption is of this unit, but the condition upon which the exemption springs into being and the period for which it endures is " while said meeting-house shall be used" for the charitable purposes set forth in this act, and not while the entire estate shall be so used. Some light is thrown upon the meaning of the tax exemption clause by its course in the two branches of the General Court as manifested by their records. Although the plain meaning of a statute cannot be affected by resort to the proceedings incident to its passage (*Boston & Providence Railroad* v.

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Midland Railroad, 1 Gray, 340, 366; *Browne* v. *Turner*, 174 Mass. 150, 159; *Boston* v. *Talbot*, 206 Mass. 82, 91), it is permissible to examine records of legislative proceedings to illumine language of doubtful import. *Gardner* v. *The Collector*, 6 Wall. 499. *Blake* v. *National Banks*, 23 Wall. 307, 317, 320. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463. *Buttfield* v. *Stranahan*, 192 U. S. 470. The original draft of this clause as reported by a committee of the House provided that "said meeting-house and land shall be exempt from taxation;" an amendment added the words "while used for any of the purposes aforesaid," and subsequent amendments inserted after "while" the words "said meeting-house shall be" and appended the special tax exemption for the year 1877. This development of legislative intent shows that a general tax exemption, whether the property was preserved in its original form or not, was not desired, nor was an appropriation of the entire property *in specie* to the purposes of the act thought necessary, but the exemption from taxation of the property, including land and meeting house, was made dependent upon use of the meeting house for the general purpose of the act. The conclusion seems to follow that the tax exemption of the entire property unit persists so long as the meeting house itself is preserved and used for the purposes of the act, but that so long as this dominant design is executed, the adjacent land may be put to other uses not inconsistent therewith, which by yielding revenue may promote the general beneficient end to be accomplished by the act.

A forceful argument against this interpretation is found in the grant of power to the petitioner in § 1, to the effect that the property may be acquired and held "for public, historical, memorial, educational, charitable and religious uses and none other." In other connections this prohibition against any other use than those specified might be words of specific limitation. But it was held in *Burr* v. *Boston*, 208 Mass. 537 (where an essential feature was title in the municipality), that physical appropriation of property to public uses was not essential to exemption from taxation, and that still it might be so stamped with a public purpose as to be exempt from taxation under general principles of tax law although directly put to a private use, so long as the income was applied to the public use.

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The governing feature of this statute is expressed in the title to be "to provide for the preservation of the Old South Meeting-House." That the meeting house is the central object of the act appears not only from all the attendant circumstances, but also from each section of the act, and especially from § 3 which authorizes its use by the Commonwealth "for the annual election sermon." The financial difficulties in the way of its preservation were acute. This is apparent from the fact that the $10,000 allowed to the petitioner by c. 26 of the Resolves of 1878, "for the preservation of the Old South Meeting House" when it shall have acquired enough money from other sources to give it with that sum "complete title to said meeting house and the land connected therewith, free from all debt or incumbrance," has not yet become available for the reason that the estate is subject still to mortgage indebtedness. Although a unit of property is described as the subject of acquisition, its exemption from taxation is based upon use of the meeting-house alone for the memorial and other purposes. These considerations incline us to the view that the language quoted from § 1 means that although the property acquired must all be devoted to the uses there specified and to none other, yet, the meeting house being kept and physically appropriated as a public historical memorial, such of the adjacent land as is not reasonably necessary for the preservation of the edifice may be put corporeally to other rational uses not inconsistent with the main purpose provided its income is strictly applied to the charitable ends set forth in the act.

The petitioner contends that the land adjacent to the meeting house would be exempt from taxation in the hands of a purchaser. But this is untenable. The building and land under and adjacent is treated as a unit. It must be retained as a unit in order to remain the subject of all the benefits and immunities conferred by the statute. It is not of much consequence in this connection that it was in private ownership in 1877 and continued to be so until 1890. It was a unit, nevertheless, held for the single regnant purpose of a historical and educational institution and monument.

It follows that the petitioner's second request should have been given. In accordance with the terms of the report, let the entry be

Judgment for the petitioner for $25,000, with interest from February 26, 1907.

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FREDERICK W. COY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 21, 22, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Street Railway. Negligence, Street railway. *Evidence,* Relevancy and materiality.

It is the duty of a street railway company to protect its passengers from injuries resulting from harmful misconduct on the part of other passengers so far as such misconduct reasonably can be anticipated and guarded against, and to that end to use all practicable means consistent with proper efficiency in the management of its business which experience or a due consideration of the circumstances suggest.

At the trial of an action for personal injuries against a street railway company by a passenger who was knocked from the left hand running board of an open car by another passenger who was rushing to leave the car, there was evidence that at the time of the accident the car was crowded with passengers and was approaching a transfer station maintained and controlled by the defendant, that it was a practice of passengers, of which the defendant knew or should have known, at the time of day and at the place of the accident to leave cars on the left hand side, rush across an intervening track and take a train about to depart from the station, and that such conduct was likely to result in injury to other passengers. Evidence was offered by the plaintiff tending to show that by the use of a sidebar on the left hand side of the car or by the construction of a fence between the tracks such conduct on the part of passengers might be prevented. The evidence was excluded and a verdict was ordered for the defendant. *Held,* that the evidence was competent on the question whether the defendant had done all that was practicable to prevent such an accident as occurred, and therefore that it should have been admitted; and that the case should have been submitted to the jury.

MORTON, J. This is an action of tort to recover for personal injuries received by the plaintiff on June 5, 1905, while a passenger on one of the defendant's cars. At the close of the evidence the presiding judge* directed a verdict for the defendant, and by agreement reported the case "upon all the evidence that has been properly admitted, and such other evidence, if any, as has been offered and not admitted which should have been admitted, and no other." If a verdict should not have been directed for the defendant, judgment is to be entered for the plaintiff for $1,900; otherwise, judgment is to be entered on the verdict for the defendant.

* *Dana,* J.

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We think that the plaintiff is entitled to judgment. On the day of the accident the plaintiff took a surface car at the corner of Savin and Warren Streets, Roxbury, for the elevated station at Dudley Street on his way to his place of business on Haverhill Street, Boston. The seats of the car were all full and there was no room on the right hand running board and he took a place on the left hand running board and remained there till the accident. Other passengers also got on to the left hand running board. The plaintiff stood between the second and third seats from the rear, holding on to a stanchion, and while in that position paid his fare to the conductor. As the car was entering on the loop at the top of the incline which led up to the Dudley Street station, "passengers began to make a rush for the left hand running board and across the tracks up the steps to the train of the elevated. There were six or eight made the dive all at once in front of the witness, and one who was in the rear of the witness, practically in the rear, as the witness stood at the second seat from the rear, came against him with such force that it broke his hold on the stanchion and he was thrown clear over to the opposite track, striking on his left shoulder and left hip." This was the plaintiff's account of the way in which and the circumstances under which the accident happened. Testimony from other witnesses tended to show that it was the practice for passengers to leave the car hastily at or near the point where the accident occurred and cross the tracks to catch the elevated train that might be standing at the station. They did this instead of waiting for the car to come to a stop at the station a little farther on. The manner of leaving the car was described by different witnesses as "hurriedly, . . . with degrees of violence and jostling, . . . more or less of a rush." One witness testified that "he had seen passengers jump from the running rail [board] to the track and cross over to the elevated trains. That the passengers so jumping moved very quickly." Another witness testified that "he had seen passengers at that point jump off. That the witness had seen them coming in contact with people in doing that, and had seen them shove." This witness on cross-examination said that it "made no difference whether any one was standing on the running board. They brushed right by them and rushed over there as though they didn't have a minute to live." The estimates in regard to the number of passengers jumping off

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varied from four to six or eight or ten according to the more or less crowded condition of the car. As to the frequency with which the jumping off occurred, one witness said that it took place "five times out of six;" another, that "hardly a day went by . . . but they would jump;" still another, that "it occurred every time he went there, which was three times a week," and a fourth, that "he would see this happen nearly every morning." The evidence tended to show that the practice had continued for a considerable length of time.

It was the duty of the defendant to protect its passengers from harmful misconduct on the part of other passengers so far as the same could be reasonably anticipated and guarded against, and to that end to use all practicable means consistent with proper efficiency in the management of its business which experience or a due consideration of the circumstances might suggest to prevent the occurrence of such an accident as happened. *Kelley* v. *Boston Elevated Railway*, 210 Mass. 454. *Glennen* v. *Boston Elevated Railway*, 207 Mass. 497. *Jackson* v. *Old Colony Street Railway*, 206 Mass. 477. *Beverley* v. *Boston Elevated Railway*, 194 Mass. 450. *Kuhlen* v. *Boston & Northern Street Railway*, 193 Mass. 341. The evidence tended to show the existence of a practice which, if it was not known to the defendant, should have been known to it, and which reasonably might have been anticipated as likely to result in such an accident as that which happened to the plaintiff and against which therefore it was the defendant's duty to protect the plaintiff if reasonably practicable to do so. As bearing on that the plaintiff offered to show that it was practicable to put up a fence that would prevent passengers from crossing the track to take the elevated cars, and that that had been done since the accident. He also offered to show that it was practicable to put side bars on the left hand side of the cars which would prevent passengers from getting off on that side as they were accustomed to do. The evidence thus offered was excluded. Subsequently the defendant admitted that the construction of a fence was physically possible and practicable. We do not see why the evidence was not admissible for the purpose for which it was offered, namely, to show that having regard to the defendant's business it was practically possible at the time of the accident to have sidebars and a fence. It bore directly on the question whether in view of

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the practice which was shown to exist and of which the defendant was bound to take notice, the defendant had done all that was practicable to prevent such an accident as occurred.

The case of *Marr* v. *Boston & Maine Railroad*, 208 Mass. 446, is distinguishable from this case. In that case "there was no evidence that on previous occasions the passengers had jostled or pushed each other." What occurred in the present case did not result from the sporadic act of a single individual, as suggested in *Glennen* v. *Boston Elevated Railway*, *supra*, which the defendant had no reason to anticipate, but was due to a practice which it was required so far as it could to prevent and guard against.

It is not contended that the plaintiff was not a passenger or not in the exercise of due care.

The result is that we think that a verdict should not have been directed for the defendant, and in accordance with the terms of the report the entry will be, judgment for the plaintiff for $1,900.

So ordered.

C. H. Donahue, (*W. T. Atwood* with him,) for the plaintiff.

J. T. Hughes, for the defendant.

AARON DAVIS *vs.* NEW YORK LIFE INSURANCE COMPANY. CHARLES C. DAVIS *vs.* SAME.

Suffolk. May 20, 1912. — June 18, 1912.

Present: MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Insurance, Life. *Contract*, Construction. *Conflict of Laws*. *Words*, "Children."

An application in writing for a policy of life insurance to be issued by an insurance company with its office in the State of New York was dated in Massachusetts and delivered to a local agent of the company, accompanied by a medical certificate also dated in this Commonwealth. The application contained a provision that "under no circumstances shall the policy be in force until the actual payment to and acceptance of the premium by an authorized agent of the company." The policy was received from the company by the agent and by him sent to the insured, and the premium was paid to the agent. Neither the application nor the policy contained any provision respecting what law was to govern its construction or what was the place where it was to be performed. *Held*, that the contract was made in Massachusetts and should be construed in accordance with Massachusetts law.

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Greater strictness is exercised in the construction of contracts than in the construction of wills.

A policy of life insurance provided that, if the wife of the insured was not living at the time of his death, the amount of the insurance should be paid to the wife's "children, for their use, or to their guardian, if under age." The insured and his wife had three children, one of whom died before the insured, leaving children. The wife died before the insured. The children of the deceased child of the insured claimed the share of the insurance that would have been their parent's had he survived the insured. *Held*, that the word "children" in the policy did not include grandchildren, and therefore that the insurance should be divided only between those children of the wife who survived the insured.

MORTON, J. In these two actions the plaintiffs seek to recover each one sixth of the proceeds of a policy for $10,000 issued by the defendant company on the life of their grandfather on their mother's side. The policy provides that the defendant company "In consideration of the representation made to them in the application for this policy, and of the sum of Five Hundred forty-one dollars and sixty cents, to them in hand paid by Jane, wife of Charles F. Claflin, and of the annual premium for nine years of Five Hundred forty-one dollars and Sixty cents. . . . Do assure the life of Charles F. Claflin, Shoe Manfr. of Milford in the County of Worcester, State of Massachusetts, in the amount of Ten thousand Dollars, for the term of his natural life, commencing on the Twelfth day of Mch. 1864. . . . And the said Company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum assured, to the said Jane Claflin & her legal representatives within sixty days after due notice . . . of the death of the said C. F. Claflin.

"And in case of the death of the said J. Claflin before the decease of the said C. F. Claflin, the amount of the said Insurance shall be payable after her death to her children, for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid C. F. Claflin as aforesaid."

The date of the policy was June 27, 1864. Charles F. Claflin, the insured, lived in Milford, Massachusetts, and had no other residence. The only children of said Charles F. and Jane Claflin were Agnes M. Claflin (Davis), Grace J. Claflin and Charles A. Claflin. Agnes M. Claflin (Davis) died in 1886, and the plaintiffs are her only children. Jane Claflin, the wife of the insured, died in 1907, and Charles F. Claflin, the insured, died in 1909,

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leaving as his only surviving children Charles A. Claflin and Grace J. Claflin. The plaintiffs have made due demand for the portion of the proceeds of the policy which their mother would have taken if living.

The questions presented relate to the construction of the contract contained in the policy. The first question is whether the contract is a Massachusetts contract or a New York contract. The evidence in regard to that matter is exceedingly meagre. But the application provides that "under no circumstances shall the policy be in force until the actual payment to and acceptance of the premium by an authorized agent of the company." The insured lived at Milford in this State and had no other residence. The application was dated at Milford, as also was the medical certificate accompanying it. One Kimball is designated in the application as "agent," meaning, we infer, agent of the defendant company in this Commonwealth; and from the letter dated at Lynn from him to the insured, it could be fairly inferred that the policy had been received by him from the defendant company and sent by him to and received by the insured at Milford, and that the premium on the policy was duly paid to him as required by the application. Under those circumstances we think that the contract was a Massachusetts contract. *Thwing* v. *Great Western Ins. Co.* 111 Mass. 93, 109. *Millard* v. *Brayton,* 177 Mass. 533. It is to be noted that neither the application nor the policy contains any provision respecting the law which is to govern, or the place of performance.

The remaining question and the vital one is, what rights, if any, have these plaintiffs in the proceeds of the policy? And the answer to that depends on the nature of the right or interest, if any, which their mother as one of the children of Charles and Jane Claflin had in the policy at the time of her death. The plaintiffs are not named in the policy and they take, if at all, through their mother. It is to be observed at the outset that though the provision made by the insured for his wife and children partakes of a testamentary nature in that it takes effect after his death, the instrument before us for construction is not a will but a contract entered into between the insured on the one side, and the insurance company, the defendant, on the other side, and which the plaintiffs are seeking to enforce as such. The rules applicable to its con-

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struction are therefore those relating to contracts and not those relating to wills. In the case of wills, in the drawing of which it is the intention of the testator alone which it is sought to express, greater liberality is allowed in order to prevent the testator's purposes from being defeated. But in the case of contracts entered into it may be after much negotiation and after much consideration of their terms by the parties interested, and where the language used is presumed to have been chosen because it aptly and correctly describes the respective rights and liabilities of the parties, greater strictness is properly required. In the present case the defendant company undertook to pay to Jane Claflin and her legal representatives within sixty days after proof of the death of her husband. If she died before her husband, then it undertook to pay to her children for their use or to their guardian if under age. It did not undertake to pay to her grandchildren or to her children's legal representatives. It undertook to pay only to her children. Ordinarily the word "children" will not include grandchildren. It does not include them in the statutes relating to descent and distribution in this State. *Bigelow* v. *Morong*, 103 Mass. 287. If, however, taking other provisions of the policy into account or taking the policy as a whole and the circumstances under which it was issued, it were apparent that the word "children" was used in a sense which would include grandchildren, then it should be so construed. But we do not find anything in the policy or in the circumstances under which it was issued to warrant us in giving it any other than its ordinary meaning. So interpreted it excludes the plaintiffs and necessarily leads to the conclusion that only those children take who survive their mother. No others answer to the description of children at the time of the death of Jane Claflin. This view is fortified by the consideration that if there are any children under age payment is to be made to their guardian. Manifestly this can apply only to children who survive their mother. If the right of the children to share in the proceeds of the policy is contingent on their surviving their mother, as it is if only those who survive answer to the description of "children" according to the proper construction of the policy then a child dying before the mother would have no interest which was transmissible at his or her death. It is settled that at her death the wife had no transmissible interest in the proceeds of the

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policy since her right to the proceeds was contingent on her surviving her husband. *Fuller* v. *Linzee*, 135 Mass. 468, 471. And the same thing would be true of the children if their right to share in the proceeds was contingent, as we think it was, on their surviving their mother. In *Millard* v. *Brayton*, 177 Mass. 533, the contract of insurance was between the wife and the insurance company for her benefit on her interest in her husband's life, and the interests of the children were held to be vested and as such to enure to the benefit of their legal representatives. In *Winslow* v. *Goodwin*, 7 Met. 363, the question arose under a will, and the court held that it was the intention of the testator that the children should take as of his death though their interests were liable to be defeated by the death of their father during the life of their mother.

Courts in other jurisdictions differ as to the construction to be given to provisions in policies of life insurance like those which we are considering. In some it is held that the child of a deceased child takes the share which his parent would have taken if living. The leading case in favor of this construction is *Continental Life Ins. Co.* v. *Palmer*, 42 Conn. 60. See also *In re Estate of Conrad*, 89 Iowa, 396; *Robinson* v. *Duvall*, 79 Ky. 83; *Michigan Mutual Life Ins. Co.* v. *Basler*, 140 Mich. 233; *Voss* v. *Connecticut Mutual Life Ins. Co.* 119 Mich. 161; *Glenn* v. *Burns*, 100 Tenn. 295. These cases go upon the ground that the policy is to be regarded as a testamentary disposition in favor of his wife and children by the party whose life is insured, and should be construed accordingly. The other view is that the policy is to be regarded as a contract between the parties to it and that in construing it the language used is to be given its ordinary meaning unless it is apparent that it was used in a different sense, and that so construed the word "children" does not include grandchildren. This is the view adopted in *United States Trust Co.* v. *Mutual Benefit Life Ins. Co.* 115 N. Y. 152; *Walsh* v. *Mutual Life Ins. Co.* 133 N. Y. 408; *Bradshaw* v. *Mutual Life Ins. Co.* 187 N. Y. 347; *Succession of Roder*, 121 La. 692; 15 Am. & Eng. Ann. Cas. 526; and *Winsor* v. *Odd Fellows' Beneficial Association*, 13 R. I. 149. This view is said in a note to *Succession of Roder*, 15 Am. & Eng. Ann. Cas. 526, 531, to be in accordance with the weight of authority, and we think that it is the sounder view.

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The result is that we think that according to the report* judgment should be entered for the defendant in each case.

So ordered.

The cases were submitted on briefs.

H. Livermore, for the plaintiffs.

W. A. Morse, F. J. Geogan & C. G. Morse, for the defendant.

COMMONWEALTH *vs.* LANCASTER MILLS.

Worcester. May 20, 1912. — June 18, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Labor. Weaving Fines. Words, "Fine."

In St. 1911, c. 584, providing that "no employer shall impose a fine upon an employee engaged at weaving for imperfections that may arise during the process of weaving," the word "fine" must be taken to mean merely a penalty, arbitrarily inflicted by the employer upon an employee for an imperfection in weaving without regard to whether the imperfection arose from any fault of the employee, by a deduction from the amount of the wages to which the employee is entitled by his contract of employment, whether that amount has been determined by the value of his work or by a fixed rate of compensation.

Where, at the trial of a complaint for an alleged violation of St. 1911, c. 584, which prohibits the imposition by an employer upon an employee engaged at weaving of a "fine" for imperfections that may arise during the process of weaving, it appears that before the alleged offense the employee had been in the employ of the defendant for several months, that there was posted in the room where he worked a "price list for weaving" setting forth the prices to be paid employees for "first quality" and for "second quality" cloth, from which it appeared that for the "second quality" one half as much was paid as for "first quality," that the employee was working with knowledge of the terms of his employment as set forth in the list and had accepted them, that the work of the employee which gave rise to the commission of the alleged offense was examined by competent inspectors whose fairness was not questioned, and that they found that it was of "second quality" and that the employee was responsible for that condition. The employee thereupon was paid at the rate agreed upon for "second quality" production, which was the alleged offense. The amount by which the employee's wages were decreased as the result of the classification of the qualities of the cloth was less than the loss to the defendant resulting from the production of "second

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* The cases were tried before *Dana*, J., who at the close of the evidence ordered verdicts for the defendant and reported the cases for determination by this court.

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quality" cloth. *Held*, that the defendant had not imposed a "fine" as prohibited by the statute, and that a verdict should have been ordered for him.
St. 1911, c. 584, does not repeal St. 1909, c. 514, §§ 114–116.

COMPLAINT, received and sworn to in the Second District Court of Eastern Worcester on December 21, 1911, charging a violation on December 12 of St. 1911, c. 584, in that the defendant, "being an employer of labor did impose a fine of seventy-one cents upon Henry Dilling, an adult employee engaged at weaving" in its mills at Clinton "for imperfections arising during the process of weaving."

The case was tried before *Hall*, J., upon an agreed statement of facts substantially as follows:

During the week ending December 2, 1911, Dilling was employed as a weaver of cloth by the defendant and had been so employed for several months. Posted in the weaving room where Dilling worked and forming the basis of compensation for weaving, were placards entitled "Price List for Weaving," which stated the price paid to the employees for "first quality" and for "second quality" of various kinds and sizes of cloth there woven. The price for "second quality" was in each case one half of the price for "first quality." When Dilling was paid for weaving done during the week ending December 2, 1911, it was found by competent inspectors that a certain portion of his work came within the class of work known as second quality, and that the weaver was responsible for such condition. He was paid at the rates named in the posted notice for such work as he had produced of first quality, and for such work as he had produced of second quality. It was not contended that there was any unfairness in the grading of the work or that Dilling was not paid properly on the basis of the posted schedule. Dilling could read and write, and was working with knowledge of the terms of his employment as set forth by the notice and had accepted them. The amount by which the wages were decreased as a result of the classification was less than the loss to the defendant resulting from the production of second quality cloth by the weaver.

The defendant asked the judge to rule, "that the jury be instructed that on the evidence as presented the defendant as matter of law must be found not guilty" and to "order a verdict accordingly;" and, "that the action of the defendant corporation

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upon the agreed statement of facts did not constitute a 'fine' within the meaning of the above-named statute."

The judge refused so to rule and ruled that the acts described were in violation of St. 1911, c. 584, and that a verdict of guilty was warranted. Such verdict having been returned the defendant alleged exceptions.

The case was submitted on briefs.

R. Olney & C. G. Bancroft, for the defendant.

J. A. Stiles, District Attorney, *& E. T. Esty*, Assistant District Attorney, for the Commonwealth.

SHELDON, J. It is provided by St. 1911, c. 584, that "No employer shall impose a fine upon an employee engaged at weaving for imperfections that may arise during the process of weaving." Looking at the earlier statute of 1891, c. 125, § 1, and at the decision in the case of *Commonwealth* v. *Perry*, 155 Mass. 117, we are of opinion that the word "fine" in the later statute must be taken to mean merely the arbitrary imposition of a penalty for an imperfection in weaving by a deduction from the amount of the wages to which the employee is entitled by his contract of employment, whether that amount has been determined by a *quantum meruit* or by a stipulation for a fixed rate of compensation. It is intended to prevent the employer from imposing a penalty for an imperfection in the finished product, whether or not due to the fault of the employee, and enforcing its collection by deducting it from what has become due to the employee. So construed, as was said by this court in *Commonwealth* v. *Perry*, *ubi supra*, on pages 120, 121, it could perhaps be sustained as a valid police regulation. See *Opinion of the Justices*, 163 Mass. 589; *Squire* v. *Tellier*, 185 Mass. 18, 20; *Commonwealth* v. *Strauss*, 191 Mass. 545, 550, *et seq.*; *Mutual Loan Co.* v. *Martell*, 200 Mass. 482, 484; *Opinion of the Justices*, 208 Mass. 619. But that question is not presented.

In the case at bar, it could at any rate have been found that the weaver had received exactly the wages for which he had contracted. The system adopted by the defendant was within the authority given by St. 1909, c. 514, §§ 114–116, and it is not contended that any of the requirements of those sections have been violated. The act of 1911 does not purport to repeal any of those provisions, and it is not necessary to construe it as having that effect.

If the present act did repeal the provisions of St. 1909, c. 514, above referred to, and went to the full extent for which the Com-

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monwealth has contended in this case, it would be difficult, without overruling *Commonwealth* v. *Perry*, 155 Mass. 117, to maintain its constitutionality.

The rulings requested by the defendant should have been given. *Gallagher* v. *Hathaway Manuf. Co.* 172 Mass. 230.

Exceptions sustained.

ROSELLA A. ROCKWELL *vs.* HAMBURG-BREMEN FIRE INSURANCE COMPANY.

SAME *vs.* SUN INSURANCE OFFICE.

SAME *vs.* DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* NEW HAMPSHIRE FIRE INSURANCE COMPANY.

SAME *vs.* CONCORDIA FIRE INSURANCE COMPANY.

SAME *vs.* COMMERCIAL UNION ASSURANCE COMPANY.

SAME *vs.* DELAWARE INSURANCE COMPANY.

Berkshire. September 12, 1911. — June 19, 1912.

Present: RUGG, C. J. MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DECOURCY, JJ.

Insurance, Fire. *Agency*, Scope of authority. *Waiver*. *Practice, Civil*, Report. *Words*, "Facts."

Where the judge who presided at a trial, after the jury under his direction have returned a verdict for the defendant, reports the case to this court and the report states as one question to be determined, whether "upon the facts" the ruling of the judge was correct, the word "facts" will be taken to include not only facts stated in the report as undisputed but also evidence stated in the report as to facts in dispute.

Seven policies of fire insurance of the standard form prescribed by R. L. c. 118, § 60, covering a certain building were tried together and there was evidence tending to show that, a loss having occurred under the policies, the companies within six days thereafter sent persons called "special agents" to the premises for the purpose of agreeing with the insured "upon the amount of loss," or, failing in that, "to have such amount determined by referees" in accordance with the provisions in the policy. One of such persons, in the presence of the others, in substance stated to the insured that the companies would not require him to make the sworn statement required of him by the policy after a loss, and consequently the insured never rendered the statement. The plaintiff contended that the requirement of the sworn statement was waived. *Held*, that

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there was no evidence that the "special agents" had any authority to waive such requirement on behalf of the defendants.

Where, after a loss under a fire insurance policy of the standard form prescribed by R. L. c. 118, § 60, the parties fail to agree upon the amount of loss and an agreement of reference under the terms of the policy is signed by them which provides that "neither this submission nor the award of said referees shall in any way affect any other question than the amount of the aforesaid loss or damage, nor waive nor impair any right of any party hereto," the insurance company by proceeding with the arbitration does not waive the requirement in the policy of a sworn statement signed and sworn to by the insured to be rendered to the company forthwith after the loss setting forth certain details as to the nature and use made of the property insured, the insured's interest therein, other insurance thereon, and the time and cause of the fire.

The owner of a building insured against fire under a policy in the form prescribed by R. L. c. 118, § 60, after a fire causing a loss under the policy failed to render to the company the statement under oath required by the policy. The parties having failed to agree on the amount of the loss, that question was referred to arbitrators under the terms of the policy. The report of the arbitrators was not recognized by the company as valid. Correspondence then occurred between the attorneys for the parties in which, in reply to a letter from the insured's attorney demanding payment and threatening suit, the company's attorney wrote that there had been "No arbitration of the amount of" loss, and that no loss was "as yet payable to [the insured], if any liability exists on the part of" the company, and, in reply to the threat of suit, that the company would "rely upon all" its "legal rights in the premises." In a later letter, in response to an inquiry by the insured's attorney, the company's attorney merely stated why the referee's proceedings were not satisfactory to it and suggested a new arbitration, and there was no withdrawal of the language of his previous letter. *Held*, that there was not in such correspondence any evidence of waiver by the company of the requirement in the policy of the sworn statement above described.

HAMMOND, J. These are seven actions upon seven policies of fire insurance, all tried together before a jury. Each policy was in the standard form prescribed by R. L. c. 118, § 60, and each contained the following provision: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured."

At the trial it appeared that no such statement was given, and in each case the defendant relied upon that fact as one of the

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grounds of defense. The plaintiff relied upon waiver. In each case a verdict was ordered for the defendant, and the cases are before us upon the report of the trial judge.* One of the questions is whether "upon the facts" the jury would have been warranted in finding a waiver. We understand the word facts used in this connection to include not only the undisputed facts but also the evidence as to the facts in dispute, or in other words that the question is whether upon the whole evidence as reported the jury would have been warranted in finding a waiver.

The plaintiff seeks to find evidence of waiver in the proceedings instituted for the purpose of ascertaining the amount of loss. These proceedings took place in compliance with another provision contained in each policy, which reads as follows: "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons, to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss."

It is well to note in this connection the nature of the sworn statement required by the policy and its relation to the question of damages. It must set forth (1) the value of the property insured, (2) the interest of the insured therein, (3) all other insurance thereon, in detail, (4) the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and (6) the time at which and the manner in which the fire originated so far as known to the insured. It is manifest that with the exception of the value of the property this statement would have no bearing whatever upon the single question of the loss or damage caused by the fire, but it is equally plain that the statement may have a very material bearing upon whether the insured has complied with all the many provisions of the policy material on the question of liability, or in other words whether the defendants were answerable for such loss.

* *Fessenden*, J.

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It is a statement having only the most remote relation to the amount of loss, and bearing almost exclusively upon the question of liability. On the contrary the provision under which the proceedings under consideration took place concerns in no way the question of liability but simply the amount of damage which the insured has suffered, and which the insurer, if liable at all, must pay. Speaking generally, the first clause concerns only the question of liability, the second only that of the amount of loss.

It is to be noted also that the several persons who went to the store six days after the fire do not appear to have been the general agents of any of the defendant companies. On the contrary they are described as special agents. They went there for the purpose of agreeing with the insured "upon the amount of loss," or failing such an agreement, "to have such amount determined by referees" in accordance with the terms of the policy. That was their errand and they had no other. Whether the defendants had any ground upon which to contest their liability upon the policy, or whether having it they would waive it, was something about which these agents had no duty to perform nor power to act. In this respect the cases before us differ widely from cases like *Little* v. *Phœnix Ins. Co.* 123 Mass. 380, upon which the plaintiff relies. Their representations as to the attitude of the defendants on the question of liability were outside the scope of their agency, were not the representations of the defendants, and the defendants are not answerable for them. And this is true of the remarks said to have been made to the plaintiff's agent by Burns, a special agent of one of the defendants, in the presence of the other special agents, to the effect that the plaintiff need not make out the sworn statement required by the first clause hereinbefore quoted, and that "the insurance companies understand your case and the agents who represent them, you have notified them and what you have got to do is to select three men and we select three men, you select one of our three men and we select one of your three men, and whatever decision they arrive at shall be final." It is to be noted that so far as respects the question of settling the amount of loss, which was the only one with which these agents were concerned, these remarks contained an accurate description of the proceedings to be instituted after a failure to agree. But even if they went further and by a fair interpretation contained a statement that the defend-

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ants would not require the sworn statement above named, they were entirely unauthorized for grounds above stated and are not shown to have been known to or ratified by the defendants.

After a failure to agree, the agreement for arbitration was signed in accordance with the terms of the policy. This agreement expressly provided that "neither this submission nor the award of said referees shall in any way affect any other question than the amount of the aforesaid loss or damage, nor waive nor impair any right of any party hereto." Even if there had been any doubt in the minds of either party as to the intention of the other, here was a plain declaration that by the proceedings under the arbitration clause neither waived any right. By that declaration each party must stand. The only thing done by the company was to send down agents to agree upon the amount of loss, or in case of failure of an agreement, to agree upon arbitration in accordance with the terms of the policy.

While the defendants might have waited for the sworn statement before attempting to settle the amount of loss, yet it is very important, especially where there is reason to believe or suspect that either through bad faith, mistake or honest prejudice the insured may exaggerate the amount of his loss, that the insurer should be promptly on the spot and begin an investigation. And the mere fact that the insurer does so appear and proceed to determine the loss and sign an agreement for arbitration like the one in this case is no evidence of a waiver of the requirement of the policy as to the sworn statement. See *Cook* v. *North British & Mercantile Ins. Co.* 183 Mass. 50, and cases cited. *Boruszewski* v. *Middlesex Mutual Assur. Co.* 186 Mass. 589, and cases cited.

The plaintiff further contends that the correspondence which subsequently took place between the respective counsel would warrant a finding of waiver. Even if it be assumed in favor of the plaintiff that the letters written by the counsel for the defendants were duly authorized, we are of opinion that there is in the correspondence no evidence of waiver. While it is true that the letter of March 30, 1909, in answering the suggestion as to proof of loss contained in that of the plaintiff's counsel of March 29, 1909, states that the writer has been informed by the insurance companies interested "that no arbitration of the amount of this loss has been had and that no loss is as yet payable to Mrs.

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Rockwell," it is also true that immediately following these words come these, namely, "if any liability exists on the part of these companies;" and the letter ends thus: "I beg to advise you that the companies will rely upon all their legal rights in the premises." Certainly here is no evidence of waiver. The letter of April 24, 1909, simply states in answer to an inquiry made in the letter of April 20, 1909, about the reference, the reasons why the referees' proceedings are not satisfactory to the defendants and proposes a new arbitration. But there is no withdrawal of the language contained in the letter of March 30, 1909, and we find no evidence of waiver in this more than in the original proceedings for reference.

In the opinion of the majority of the court there was no evidence which would warrant a finding by the jury that the provision of the policy requiring a sworn statement was waived by any of the companies.

It becomes unnecessary to consider the grounds of defense peculiar to the New Hampshire Fire Insurance Company and the Dorchester Mutual Fire Insurance Company, or the other grounds of defense common to all the defendants. In each case the order is

Judgment for the defendant.

The case was argued at the bar in September, 1911, before *Morton, Hammond, Braley, & Rugg,* JJ., and afterwards was submitted on briefs to all the justices.

M. B. Warner, (*J. Barker* with him,) for the plaintiff.

W. L. Came, (*F. W. Brown & J. F. Noxon* with him,) for the defendants.

ELIZA J. BURLESON *vs.* GEORGE R. WOODIN & others.

Suffolk. December 4, 5, 1911. — June 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, Fraud, Trust.

In a suit in equity by a woman against a promoter of mining schemes to compel the defendant to reassign to the plaintiff a mortgage which he was alleged to have induced the plaintiff by fraud to assign to him, the defendant testified that he took from the plaintiff an assignment of a mortgage for $4,700 to raise for the

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plaintiff $3,000 to enable her to purchase shares of stock in a mining company which he was promoting, that the defendant borrowed $3,000 from a trust company on an assignment of the mortgage and delivered to the plaintiff the shares of mining stock and that later he took up the loan from the trust company by borrowing $3,500 from one S on an assignment of the morgtage. It appeared that the plaintiff had been a dressmaker who had retired from business on account of ill health and was living in three rooms in a tenement house. There was evidence on which it could be found that the defendant visited her at her rooms where he talked to her about the mining company and its prospects, that as the result of one or more interviews he sold her the mining stock at $50 a share, and that the stock was of no value. *Held*, that on the defendant's own statement he held the mortgage as trustee for the plaintiff both as to the loan obtained from the trust company and that obtained from S. *Held, also*, that the evidence warranted a finding that the defendant obtained the assignment from the plaintiff by deception and fraud, it being a reasonable inference from the facts shown that the plaintiff would not have purchased the mining stock at $50 a share unless she fraudulently had been imposed upon by the defendant's representations; accordingly that the plaintiff was entitled to a decree requiring the defendant to pay his note for $3,500 to S and to reassign the mortgage to the plaintiff upon the surrender of the mining stock by the plaintiff to the defendant.

MORTON, J. This is a bill in equity brought by Eliza J. Burleson, now prosecuted by the administrator of her estate, for relief in respect to two mortgages, one of $4,700 and the other originally of $1,500 on which there was a balance of $500 due when the bill was filed, and of both of which the bill alleges that the plaintiff is the owner and payee. The bill alleges that the defendant Woodin claims to have received from the plaintiff assignments of said mortgages, and that the defendant Squires claims to be the lawful owner and holder of the mortgage for $4,700 and is threatening to foreclose it and apply the proceeds to the payment of Woodin's overdue note for $3,500. The bill denies that the plaintiff ever assigned either of the mortgages to Woodin, but avers that if she did such assignment was procured by fraud and undue influence on Woodin's part and was without consideration. An amendment to the bill was allowed in which it was averred upon information received by the plaintiff since the filing of the bill that the defendant Woodin, after the alleged assignment to him of the mortgage for $4,700, borrowed $3,000 from the Beacon Trust Company on an assignment of said mortgage, which he claims was paid to the plaintiff in stocks which she then purchased. The plaintiff denies that she purchased any stock but alleges that if it appears that Woodin did borrow and pay over said sum of $3,000 for stock purchased

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by her, the stock was purchased through fraud and undue influence on his part and was then and is now worthless; and the plaintiff offers to surrender it to Woodin. There was a decree for the plaintiff requiring the defendant Woodin to take up and pay his note for $3,500 to the defendant Squires and to return to the plaintiff the mortgage for $4,700 and requiring the plaintiff to surrender the stock to Woodin and also requiring the defendant Squires, upon payment by the plaintiff or Woodin of the amount due on Woodin's note for $3,500, to assign the mortgage to the plaintiff. The defendant Woodin appealed.

A memorandum was filed by the presiding judge * in which he made the following findings and rulings: "If the defendant Woodin took the assignment of the . . . mortgages . . . for the purpose of raising money on them for the use of the plaintiff, as he claims, he took them upon a trust, which he abused and violated when he used one of them as his own property for his own use. If he obtained such assignment . . . by deception and by fraud practiced upon the plaintiff by him, which I find was the fact, the mortgages are still impressed with a trust *ex malefacio*, for her; and in either case he should restore them to her." He also found that "The 'Enterprise' mining stock which he let her [the plaintiff] have was and is of no value."

The question is whether there was any evidence warranting these findings and the decree that was entered. We think that there was.

The evidence was all oral except that of the plaintiff which, owing to her ill health was given in the form of a deposition. Woodin himself was a witness, and there was testimony tending to show that his reputation for truth and veracity was bad. The presiding judge had an opportunity to see and hear the witnesses and in such a case his findings will not be set aside unless plainly wrong. *Elliott* v. *Baker*, 194 Mass. 518.

No question seems to be made as to the plaintiff's right to the mortgage for $1,500, though it is not mentioned in the decree. No explanation satisfactory or otherwise was offered by the defendant Woodin as to how it came to be included with the mortgage for $4,700 in the alleged assignment to him. According to

* *Richardson*, J.

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Woodin's own statement he took an assignment of the mortgage for $4,700 to raise $3,000 for Mrs. Burleson to enable her to purchase sixty shares of stock in the Enterprise Mining Company, which he was engaged in promoting. He held it therefore as trustee for her and she was entitled to a return of it upon paying the $3,000 with interest and any expenses which he had incurred. The presiding judge must have found that she assigned the mortgages to Woodin notwithstanding her denial. It is possible that she did not understand the transaction. But however that may be, the effect of what took place was, as we have said, according to Woodin's own statement, to constitute him a trustee of the mortgage for her, both as to the loan obtained from the Beacon Trust Company and that obtained from the defendant Squires, to take up and pay the loan at the trust company. Without anything more this would entitle the plaintiff to a decree. This is not the theory on which the bill either as originally filed or as amended was drawn, but no objection has been made on that ground; and if objection had been made, it easily could have been removed by amendment.

We also think that there was evidence warranting a finding that the assignment was obtained by deception and fraud, and that the "Enterprise" mining stock was not and is not of any value. Woodin's business was that of promoting mining schemes and companies and of selling stock in mining companies. He dealt more, so far as appears, with women and persons of small means who naturally would be supposed to have less experience in such matters than with persons of business training and skill and with more means. He had previously sold Mrs. Burleson stock in the Dolores Mining and Milling Company and in the Richmond Group of mines, and it could have been found, if material, that those stocks were, so far as appeared, worthless. He testified that his confidence in the Richmond Group had been shaken and, beyond his own statements to which the presiding judge could give such weight as he chose, there was nothing to show that the stock of those companies had any value. Neither had ever paid a dividend, and both could have been found to be unreliable and irresponsible stocks. At the time when he sold Mrs. Burleson the sixty shares in the Enterprise Mining Company, the company had not been formed and owned no mines. If it had any assets there was no statement

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of what they were or what its liabilities were. It never has paid a dividend, and in the last two years before the trial only one or two small lots of stock were sold. The only testimony in regard to its value came from Woodin and, as we have said in another connection, the court could give such weight to his testimony as it saw fit. It cannot be said, we think, that the finding that the stock was and is of no value was plainly wrong.

The plaintiff was a widow living in a small way in three rooms in a Washington Street tenement house. She had been in the dress-making business but had had to give that up on account of ill health. There was evidence warranting a finding that Woodin visited her at her rooms, and that as the result of one or more interviews he sold her the sixty shares of "Enterprise" mining stock at $50 a share, the par value being $100 a share. He admitted talking to her about the company and its prospects. There was no evidence that she had consulted or talked with any one else. Taking all the circumstances into account, the selling of the stock to her at $50 a share could of itself have been found to be a fraud. The more reasonable inference, if not the only inference, was that she would not have purchased the stock at $50 a share unless she had been fraudulently imposed upon by Woodin's representations.

Decree affirmed.

H. W. Ogden, for the defendant Woodin.
W. H. Hitchcock, for the plaintiff.

ELLEN KELLY, administratrix, *vs.* HORATIO N. ALLIN & another.

Suffolk. December 5, 6, 1911. — June 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, For an accounting. *Attorney at Law. Evidence*, Presumptions and burden of proof, Opinion: experts. *Equity Pleading and Practice*, Exceptions to master's rulings on evidence.

In a suit in equity by a woman against an attorney at law for an accounting, it appeared that the defendant acting as attorney for the plaintiff had brought an action for her against a third person for a sum of money amounting to $6,000 which she believed to be due to her, and that the defendant without the knowl-

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edge or consent of the plaintiff caused a judgment for such third person to be entered in such action, in return for which the defendant received personally from such third person an option to purchase certain real estate for a certain price which was $6,000 less than its market value and afterwards received a conveyance of the real estate for which he paid the price agreed, and that the defendant fraudulently concealed these acts from the plaintiff. *Held*, that the defendant had been guilty of a breach of trust and had committed a fraud upon the plaintiff, and that the plaintiff was entitled to an accounting for the profits realized by the defendant with interest from the date of the conveyance of the real estate to him; that it was immaterial whether the plaintiff had a good cause of action in the action which the defendant had caused to be disposed of for his own benefit; and that the plaintiff had the right to elect whether she would bring a suit to compel a conveyance to her of the property which the defendant had acquired by his breach of trust or the present suit to hold the defendant accountable for the gain which he had made.

In a suit in equity for an accounting, against an attorney at law who committed a breach of trust and a fraud upon the plaintiff by receiving personally certain property in return for the surrender of a claim of the plaintiff entrusted to him for collection and the surrender of another claim in which the plaintiff had no interest, if the defendant wishes to show that a part of the consideration for his receipt of the property was the surrender of such other claim, the burden is upon him to show what that part was, and in the absence of evidence upon the subject it will be assumed that the whole of the consideration for the property was the surrender of the claim of the plaintiff.

In a suit in equity, in which a material question was the market value of a block of apartment houses in Brookline which had been purchased by the defendant, who was an attorney as law, the defendant at a hearing before a master offered himself as an expert on the question of the market value of the property. It appeared that the defendant besides buying the property in question had bought one other piece of real estate in another part of Brookline, but that he never had acted as an agent in handling real estate or had to do with the buying or selling of store property in Brookline or of vacant land in the vicinity in question or of other apartment house property. The master found that he was not qualified to testify as an expert and excluded the evidence. *Held*, that the question whether the defendant was qualified to testify as an expert was a matter to be determined by the master.

An exception in a suit in equity to the admission by a master of evidence for the purpose of contradicting the testimony of the excepting party, where the evidence admitted tended only to contradict his testimony upon an immaterial matter and did not prejudice him, should be overruled.

MORTON, J. This is a bill in equity to compel an accounting by the defendant Allin, hereafter called the defendant, in respect to certain property alleged to have been received by him in consideration of the entry by him of judgment for the defendant without costs, without the plaintiff's knowledge or consent, in an action brought by him for her. The case was sent to a master. The defendant filed exceptions to his report and the plaintiff moved for

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the confirmation of it. Thereupon the case was reserved * for the full court on the "master's report, exceptions thereto and all questions of law therein."

According to the master's report the case presents a gross violation by the defendant of the trust and confidence reposed in him by the plaintiff and of his duty to her as an attorney at law. The plaintiff's husband was in the employ of one Thomas White, father of Charles F. and William H. White, for about twenty years, but left such employ in 1877, on his marriage to the plaintiff. He died in 1904. After his death the plaintiff sought the services of several lawyers in turn to collect a large sum of money which she claimed that her husband had intrusted to Charles F. White for investment. Finally she was brought to the defendant in July or August, 1906, and after some investigation he told her that he would act for her as her attorney and had her appointed administratrix of her husband's estate and brought an action at law against Charles F. White and Salome E. White in which William H. White was summoned as trustee. The action was duly entered in the Superior Court and a declaration was filed alleging that Kelly had placed in the hands of the defendants from time to time for investment large sums of money which amounted with interest to $6,000. William H. White appeared for himself as trustee, and also appeared as attorney for the defendants. Pending this action William H. White and his co-executor foreclosed a mortgage of $62,000 on certain real estate in Brookline. Pursuant to a previous arrangement between the defendant and White the defendant bid at the sale, but the property was struck off to White. Thereupon the defendant and one Burr, the mortgagor, brought an action against White and his co-executor for breach by them of an oral agreement relating to the sale and to subsequent loans in reference to the real estate. While these two suits were pending, the defendant called on William H. White, and as the result of interviews and negotiations between them an agreement under seal was entered into between the defendant and White, providing that in consideration of the entry of judgment for the defendants without costs in the action brought in the name of the plaintiff, and also in that brought by the defendant and Burr, White would procure

* By *Richardson*, J. The master was Clarence H. Cooper, Esquire.

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an extension of the mortgage for $62,000 and convey the equity to Allin subject to the said mortgage and all existing liens and incumbrances on or before April 1, 1909. This agreement was dated January 2, 1909. On January 11, 1909, a paper signed by the defendant as attorney for the plaintiff and by White as attorney for the defendants was filed in the action brought by the plaintiff against Charles F. White and Salome E. White, agreeing "that in the above entitled action judgment may be entered for the defendants without costs." This entry was without the knowledge, consent or authority of the plaintiff. A similar paper was filed at the same time in the action brought by the defendant and Burr. In May, 1909, about four months later, the property was conveyed to the defendant, who paid $12,000 in cash. The master found that the property was assessed at $88,000 but that the market value was $80,000. The plaintiff contended that the defendant was accountable to her for what he had made out of the transaction. The master found, if the plaintiff's contention was correct, that she was entitled to recover the sum of $6,420, made up by taking the market value of the property and adding to it the net income which the defendant had received and deducting from it the amount of the mortgage and the $12,000 paid by the defendant and interest on that amount. The plaintiff who was well advanced in years and feeble, but, as the master found, fairly intelligent, had many interviews with the defendant in the presence of a friend, in which she was repeatedly assured by the defendant that her case would be tried soon and that he would have some money for her. Some of these assurances were given as late as October, 1909, nine months after the agreement for judgment for the defendants had been filed. Early in January, 1909, he told two friends who called on him at her request that he was engaged in a land deal and if it turned out as he expected he would have some money for her, and that she had a good case against Charles White and he had no doubt that he had had her husband's money. In January or February, 1910, the plaintiff with a friend called on the defendant and he told them that if he effected a certain land deal with the Whites he would be able to give the plaintiff some money. He repeated the same thing to them the following week, when the plaintiff's friend, who had learned that the plaintiff's case had been disposed of in Janu-

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ary, 1909, told the defendant what he had been informed and the defendant became angry and ordered them out of the house. About the time when the instrument of January 2, 1909, was executed, White asked the defendant "how Mrs. Kelly came into this settlement," and he replied in substance, "I am going to look out for (or take care of) Mrs. Kelly; she ought to have something." White always contended that there was nothing in the plaintiff's claim, but the defendant would not admit that. He received no retainer and made no charge for his services or disbursements. The master finds specifically that the consideration named in the instrument of January 2, 1909, was the real consideration for the conveyance, and he sums up his conclusions as follows: "It thus appears from the preceding finding of facts, that the plaintiff placed a claim against a third person which she thought was valuable in the hands of the defendant as an attorney; that the defendant, acting as such attorney, brought suit for the collection of that claim and entered it in court; that, while the action was pending, the defendant made an agreement with the attorney for the defendants in that action to take an option for the purchase of certain property in consideration of the dismissal of that action with another; that this agreement was embodied in a written instrument under seal, executed by the defendant and the attorney above named, reciting the entry of judgment for the defendants without costs in the plaintiff's action and in another action as the consideration, which was the real consideration; that such an agreement for judgment in the plaintiff's action was signed by the defendant and filed in court without the plaintiff's knowledge, consent or authority; that thereupon the property named in the agreement was conveyed to the defendant; that the defendant stated to the attorney above named that he would take care of the plaintiff, and that she ought to have something; that, while said attorney maintained that there was nothing in the plaintiff's claim, the defendant would not admit it; that the defendant concealed from the plaintiff the dismissal of her action and made misleading statements to her for a year afterwards; and that, as the result of the defendant's acts, he has acquired, upon the payment of twelve thousand dollars ($12,000), the ownership of the equity in a valuable parcel of real estate."

It is plain, we think, that the plaintiff is entitled to relief. In

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violation of the trust and confidence reposed in him by the plaintiff as her agent and attorney, and without her knowledge or consent and for his own benefit and gain, the defendant caused an entry of judgment for the defendants without costs to be made in the action which he had brought for her against White. He also fraudulently concealed from her what he had done. Fraud is a well recognized head of equity jurisprudence, especially when it grows out of fiduciary relations like those between attorney and client. The plaintiff's right to relief is not affected by the fact that she had a remedy at law, or possibly might have had the entry of judgment vacated and the action brought forward. It was for her to elect which remedy she would pursue. It is immaterial whether the plaintiff had a good cause of action against White or not. The defendant caused the action to be disposed of for his benefit, in the manner in which it was disposed of, and he must account for what he has received. If he relied upon the fact that a part of the consideration for the conveyance to him came from the entry of judgment in the Burr case, it was for him to show what that part was, which he has not done. He was in the position of an accountant upon whom the burden rests to make good any charges which he claims should be allowed. *Little* v. *Phipps*, 208 Mass. 331. The entry of judgment furnished the consideration not only for the option which was given him, but for the conveyance when it was made. This appears from the agreement of January 2, and from the finding by the master, and is not affected by the fact that the option expired on April 1, 1909, or by the fact that the defendant contributed by his own funds and efforts to the result. *Dutton* v. *Willner*, 52 N. Y. 312. The case is not one where the plaintiff seeks to establish a resulting trust by reason of having furnished the consideration in whole or in part for the conveyance, but it is a case where the defendant has been guilty of a breach of trust and has committed a fraud upon the plaintiff and has thereby, as the plaintiff alleges, realized profits for which she seeks to hold him accountable. Nothing is better settled than that a trustee cannot use the property or estate in his hands for his own advantage or gain, or that if he does he will be accountable for any gain that he may have made from such use. The same rule applies to an agent or attorney. *York Buildings Co.* v. *Mackenzie*, 3 Paton, 378. *Dodd* v. *Wakeman*, 11 C. E. Green, 484. *Moinite* v.

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Days, 1 Baxt. (Tenn.) 431. *Leake* v. *Sutherland*, 25 Ark. 219. *Gardner* v. *Ogden*, 22 N. Y. 327. *Dutton* v. *Willner*, 52 N. Y. 312. The relations of attorney and client are not in all respects the same as those of trustee and *cestui que trust*, but in regard to this matter there is no difference between them. It was for the plaintiff to elect whether to bring suit to compel a conveyance of the property which the defendant acquired as the result of his dealings with White, or to hold him accountable for the gain which he made, which was the difference between the market value of the property and the mortgage plus the $12,000 paid by him. *Jennison* v. *Hapgood*, 7 Pick. 1. *Jennison* v. *Hapgood*, 14 Pick. 345. *Greenfield Savings Bank* v. *Simons*, 133 Mass. 415. *Gardner* v. *Ogden*, 22 N. Y. 327. *Dutton* v. *Willner*, 52 N. Y. 312. Mechem on Agency, § 469. To compel her to take the property and pay to the defendant the $12,000 paid in cash by him and assume the mortgage would be practically to deny her relief. She has elected, as she had the right to do, to hold the defendant accountable for what he made out of the transaction instead of seeking to compel him to convey the property to her.

In stating the account the master has included the net income received by the defendant from the property and allowed him interest on the $12,000 paid by him. This would be correct if the plaintiff were seeking to compel a conveyance by the defendant to her, but is not correct where what she seeks to hold him accountable for is the profit which he made. That, as already observed, is measured by the difference between the market value on one side and the mortgage and what the defendant paid in cash on the other. The master has not specifically found what this difference was, but he has stated an account from which it can be determined, and it appears that the amount thus realized by the defendant was $6,000, and we think that the plaintiff is entitled to a decree in her favor for that amount with interest from the date of the conveyance to the defendant.

The defendant does not now rely upon the exceptions so far as they relate to matters upon which he contended that the master was warranted by the evidence in making and should have made certain findings, but did not. The other exceptions now relied on are disposed of by what we have said, with the exception of those relating to matters of evidence which we proceed to consider.

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The defendant besides buying the property in question* had bought one other piece of real estate in another section of Brookline, but never had acted as an agent in handling real estate or had to do with the buying and selling of store property in Brookline or of vacant land in the vicinity in question or of other apartment house property. He offered himself as a witness on the question of the market value of the property in question. The master found that he was not qualified to testify as an expert and excluded the evidence. The fair conclusion from the report is, we think, that the defendant offered himself as a witness as an expert, not as the owner of the property. Whether he was qualified as an expert was a matter for the determination of the master. *Tucker* v. *Massachusetts Central Railroad*, 118 Mass. 546.

What we have previously said disposes of the contention based on one of the exceptions that the master erred in not finding and reporting that no evidence was offered from which he could find that the option had any pecuniary value.

The remaining exceptions relate to the admission of the transcripts from the ledgers of the New England Telephone and Telegraph Company. These were offered and admitted for the purpose of contradicting the defendant who had testified that he was on a vacation during July and August, 1908, and that his house was closed and the maid away, and that he could not have had interviews with one of the witnesses, as the witness testified. But the witness whom his testimony thus tended to contradict had not so far as appears from the record testified to any conversations with the defendant during July or August, 1908, or 1909. The mere fact that he had testified to calls on the defendant during the summer of 1908 or 1909, without anything more, was immaterial; and we therefore are unable to see how the defendant was prejudiced by the admission of the evidence. So far as there was any contradiction it related to an immaterial matter, and the exceptions to the admission of the transcripts must be therefore overruled.

The entry will be: Exceptions overruled and report confirmed, and decree to be entered in favor of the plaintiff for $6,000, with

* The property in question consisted of a block of six apartment houses, each containing three suites, at the corner of Aspinwall Avenue and Brookline Avenue in Brookline.

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interest from the date of the conveyance to the defendant to the date of the entry of the decree with costs.

So ordered.

H. S. MacPherson, (*S. Bishop* with him,) for the plaintiff.

G. L. Mayberry, (*J. Burke* with him,) for the defendant Allin.

OLD COLONY TRUST COMPANY, executor, *vs.* ANNIE L. WALLACE & others.

Suffolk. December 7, 1911. — June 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Probate Court, Parties, Exceptions. *Witness,* Cross-examination. *Executor and Administrator. Trust Company.*

In an appeal from a decree of the Probate Court allowing an instrument as a will, where no order has been made permitting a certain beneficiary to appear and be heard in support of the will, such beneficiary is not a party to the suit, although the record shows an appearance of an attorney at law in his behalf in favor of the petition of the executor; and accordingly the contestants, having summoned such beneficiary as a witness, have not the right to cross-examine him as an adverse party under R. L. c. 175, § 22.

A trust company incorporated in 1890, "with all the powers and privileges and subject to all the duties, liabilities and restrictions set forth in all general laws which now are or may hereafter be in force relating to such corporations," under the express provisions of R. L. c. 116, § 18, may be appointed the executor of a will.

At the trial of an appeal from a decree of the Probate Court allowing a will, no exception lies to the refusal of the single justice to make a ruling which calls for a finding of fact that on the evidence before him he is not bound to make.

MORTON, J. This is an appeal from a decree of the Probate Court of Suffolk County allowing an instrument dated April 17, 1905, as the last will and testament of one Mary E. Phelps. The case was heard by a single justice * without a jury. He ordered a decree to be entered affirming the decree of the Probate Court and remanding the case to that court for further proceedings. The case comes here on exceptions by the appellants to various rulings and refusals to rule by the single justice. We take up and consider

* *Braley,* J.

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the exceptions only so far as they have been argued by the appellants, treating the others as waived.

1. The appellants are sisters and a half-sister of the testatrix. Another sister, Mrs. Adams, and her children are the principal beneficiaries under the will. The record shows an appearance by Lyman W. Griswold, an attorney at law, in behalf of Mrs. Adams in favor of the petition, and he was present during a part of the hearing before the single justice. Mrs. Adams was called as a witness by the appellants and they claimed the right to cross-examine her as an adverse party. The single justice ruled that they were not entitled as of right to cross-examine her, and the appellants excepted. This is the first exception. Although "The decree of the court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world," *Bonnemort* v. *Gill*, 167 Mass. 338, 340, the executor and contestants are so far adverse parties that, as was assumed in *Moore* v. *Stoddard*, 206 Mass. 395, the executor has a right to file interrogatories under R. L. c. 162, § 41, which the contestants can be required to answer. In the present case, however, Mrs. Adams was not a party to the proceedings. The only parties were the executor on one side and the contestants or appellants on the other. While, if a proper case was made out, it was within the discretion of the single justice to have allowed her to appear and be heard in support of the will (*Old Colony Trust Co.* v. *Bailey*, 202 Mass. 283, 290, 291), no such rule or order was passed, and she was not therefore in any proper sense a party to the proceedings. The appearance of an attorney in her behalf in favor of the petition for allowance of the will did not without anything more constitute her a party to the proceedings so as to entitle the contestants to cross-examine her as an adverse party. This exception must therefore be overruled.

2. The contestants asked the single justice to rule that "Upon all the evidence the petition should be dismissed for want of jurisdiction" on the ground that the petitioner had no standing in court as executor. The ruling was rightly refused. By the act of incorporation the petitioner was authorized "to establish and maintain a safe deposit, loan and trust company in the city of Boston; with all the powers and privileges and subject to all the duties, liabilities and restrictions set forth in all general laws

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which now are or may hereafter be in force relating to such corporations." St. 1890, c. 288. By R. L. c. 116, § 18, it is expressly provided that such corporations may be appointed executors, administrators, trustees or guardians in the same manner "as a legally qualified person." The petitioner could rightly act therefore as executor. The contestants also asked the justice to rule that "The petitioner is without standing in court because it procured its nomination as executor of the will by false pretences and false representations that it had the right to act as an attorney at law in making and executing wills." The request was properly refused as calling for a finding of facts which the justice was not bound on the evidence before him to make. In addition the justice found that the testatrix was not induced to make her will by the petitioner or any officer or agent acting in its behalf. The ruling requested was rightly refused. These exceptions must also be overruled.

3. The contestants also asked the single justice to rule that the evidence did not warrant a finding that the will was legally executed in the presence of three competent witnesses, by a person having testamentary capacity. The ruling thus asked for presented a question of fact which it was for the justice to pass upon. His findings in relation thereto will not be set aside unless plainly wrong. *Wight* v. *Shaw*, 202 Mass. 541. He found that the testatrix was of testamentary capacity and that "the will was duly executed in the presence of three competent witnesses, who saw the testatrix sign, and who affixed their signatures as witnesses in her presence and in the presence of each other." So far as the evidence is reported it shows that these findings were plainly right. This exception also must be overruled.

It follows that the entry must be: Exceptions overruled.

So ordered.

C. Reno, for the contestants.

S. H. Pillsbury, for the petitioner.

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JOSEPH F. BASSITY, executor, *vs.* ELLEN G. WELCH.

Suffolk. December 8, 1911. — June 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Will, Undue influence. *Undue Influence.*

Exceptions, taken at the trial of issues in the Superior Court to the refusal of the presiding judge to rule that on all the evidence the execution of a certain will was not procured by the fraud or undue influence of certain persons or any of them, here were overruled on the ground that the questions presented were entirely questions of fact and that the findings were warranted.

A finding that the execution of a will was procured by the undue influence of a certain person can be found to be warranted although the will contained no provision for the benefit of such person.

MORTON, J. This is an appeal from the decree of the Probate Court of the County of Suffolk allowing an instrument dated January 8, 1907, as the last will and testament of one Catherine Davis. Issues for the jury were framed by a single justice and the case was sent to the Superior Court for trial. There were three issues relating to the due execution of the will, the soundness of mind of the testatrix, and the procurement of the execution of the will by fraud and undue influence on the part of Catherine Shields, Mary Cannon and Bridget Gaygin, or either of them. In the Superior Court the jury answered all three issues in the affirmative. The verdict was set aside as to the third issue. Another trial was had, at which the third issue was the only issue submitted to the jury. They answered it in the affirmative. The case is here on exceptions by the appellee to the refusal of the presiding judge* to rule that on all the evidence the execution of the will was not procured by fraud and undue influence on the part of Catherine Shields, Mary Cannon and Bridget Gaygin acting jointly, and was not procured by fraud and undue influence on the part of any one of them acting separately and individually.

The questions that were thus presented were entirely questions of fact. No fault is found with the charge to the jury or with any of the rulings of law that were required and were made. The

* *Bond,* J. After his death the exceptions were allowed by *Pierce,* J.

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evidence is all reported. We do not think it necessary to go into it here in detail. We have examined it carefully and have considered the arguments addressed to us in the briefs. The case was eminently, it seems to us, one for the jury. It was for them to say whether the money which Mrs. Welch, the contestant, received from the testatrix belonged to the testatrix or, as Mrs. Welch claimed, to her own father and mother, and it was for them to say what effect should be given to what they found to be the facts in regard to that matter. It was also for them to say what the relations between the testatrix and her children and Mrs. Welch were, and how the making of a will and the dispositions which it contained agreed with her previously expressed intentions, and to draw such inferences therefrom and from the circumstances under which the will was made as in their judgment the facts found by them warranted. They saw the witnesses, amongst whom were the parties charged with exercising undue influence, and could judge as to their credibility. The will was not made until after Mrs. Shields had moved into the house occupied by the testatrix, and both opportunity and motive could have been found to exist in her case for the exercise of undue influence. She kept secret the fact that the testatrix had given her $1,200. The gift of that sum and the devise to her of the house could have been found to be contrary to the previously expressed intentions of the testatrix, and to be more consistent than otherwise with the exercise of undue influence. There was evidence that a son of Mrs. Cannon had attempted to get the testatrix to make a will in favor of Mrs. Shields and his mother. Mrs. Cannon testified that she did not know of it, but the jury were not bound to believe her. The evidence in regard to Bridget Gaygin, who was not of kin to the testatrix and did not benefit in any way by the will, might well have been regarded by the jury as insufficient to warrant a finding of undue influence by her; but it could not be ruled as matter of law, we think, that there was no evidence warranting such a finding. There was testimony tending to show that she had lived next door to the testatrix for thirty years; that after the testatrix was taken sick she told her several times that she ought to make a will; that the testatrix said that "she was being continually bothered by everybody trying to get her to make a will," and when asked whom she meant she mentioned Mrs. Gaygin; and that on

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another occasion she said, "They all seem to be leagued together to make me make a will, that is all I hear." She did not explain whom she meant by "they," but we cannot say that the jury could not have been warranted in finding that it included Mrs. Gaygin. There was also testimony tending to show that the testatrix said "she had to make a will," meaning, as it could have been found, that she was compelled to do so by persons of whom Mrs. Gaygin was one. The case, as we have said, was eminently one for the jury.

It follows that the rulings requested were rightly refused, and that the exceptions must be overruled.

So ordered.

J. F. Bassity & S. E. Duffin, for the executor.

C. F. M. Malley, (*J. Burke* with him,) for the contestant.

ETHEL N. STEWART *vs.* JOSEPH HANREDDY.

Suffolk. March 18, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Master's report. *Equity Jurisdiction*, To enjoin nuisance.

In a suit in equity the findings of a master in regard to matters of fact have the weight and effect of the verdict of a jury in an action at law and will not be set aside or reversed unless they are plainly wrong.

A suit in equity, to enjoin a nuisance from blasting done by the defendant in the construction of a tunnel for use in connection with water works and to recover damages for injuries to the plaintiff's house and interference with his enjoyment of it, was referred to a master, who upon conflicting evidence and after taking a view of the house and the immediate locality made findings in accordance with the contentions of the plaintiff and reported the evidence before him at the hearing. A decree was entered for the plaintiff awarding damages as found in the master's report. The defendant appealed. He did not complain of any error of law and his contentions raised only questions of fact. *Held*, that on the evidence reported the findings of the master were not plainly wrong, especially when considered in connection with the view that he took and his advantage of seeing the witnesses, but on the contrary were warranted by the evidence.

MORTON, J. This is a bill in equity * to abate a nuisance from blasting caused by the defendant in the construction of a tunnel

* Filed in the Superior Court on November 2, 1910. The master was Emery B. Gibbs, Esquire. The decree was made by *Jenney*, J.

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in Newton for the Metropolitan Water and Sewerage Board, and to recover damages for the injuries to the plaintiff's dwelling house and for the interference with her comfortable enjoyment of it resulting therefrom. The case was sent to a master and he reported in favor of the plaintiff and assessed damages in the sum of $2,500. The defendant filed exceptions to the report. An interlocutory decree was entered overruling the exceptions and confirming the report, and a final decree was entered in favor of the plaintiff. The defendant appealed from the decree overruling his exceptions to and confirming the master's report, and from the final decree. The evidence was reported and is all before us.

The general rule as to the effect to be given to the findings of a master in relation to matters of fact where he has seen and heard the witnesses is too well settled to require an extended citation of authorities. Such findings will not be set aside or reversed unless they are plainly wrong. They have the weight and effect of a verdict by a jury. *Atherton* v. *Emerson*, 199 Mass. 199. *Kyle* v. *Reynolds*, 211 Mass. 110, 112.

The defendant's contentions, as stated in his brief, are: "1. That the blasting carried on by the defendant did not cause the damage for which recovery is sought. 2. That the damage was clearly the result of certain features of the construction of the house. 3. That the defendant was not negligent in carrying on the blasting." These contentions all present questions of fact.

The defendant does not complain, as we understand him, of any error on the part of the master in regard to the principles of law governing the case. The defendant was bound to exercise reasonable care and skill in blasting out the tunnel, having due regard to the nature of the work and local conditions, and that was the rule which the master applied. *Murphy* v. *Lowell*, 128 Mass. 396. *Booth* v. *Rome, Watertown & Ogdensburg Terminal Railroad*, 140 N. Y. 267. The master found "that under all the circumstances . . . the respondent did not use reasonable care in blasting out the rock in the tunnel; that he did not have proper regard for the rights and property of the complainant; that he was controlled and actuated by a determination to handle the work as economically, profitably and speedily as possible for himself, without due regard for the rights of the complainant." He also found "that the respondent had ample

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notice and warning from the complainant and others similarly situated, that damage was being done, and that the complainant was being disturbed and injured in her property by the blasting," but "the respondent made no change in the plans which he had adopted for driving the tunnel and . . . he did not seriously attempt to modify the method of blasting in the tunnel after he was notified of the injury being done." He found further "that the method employed by the respondent, and the manner it was applied, was not, under the conditions then and there existing at Newton, a reasonable and proper way to drive that tunnel." The defendant contended that "the injury to the complainant's house was caused by shrinkage and not by the blasting or by the jar and vibration caused by the blasting;" but the master found that it "was caused by the vibration and shock due to the blasting done by the respondent."

On almost all of the matters of fact involved the parties were widely at variance. The plaintiff contended and introduced evidence tending to show that her house was injured and her comfort disturbed by the blasting; that the house was jarred and caused to vibrate by the blasting operations; that the blasting was conducted in an unreasonable and improper manner and could have been modified without loss of efficiency in the work; and that the defendant had ample notice and warning of the damage that was being done but made no change in his method of tunnelling, but continued to employ the same methods. In addition it should be observed that the contract between the defendant and the sewerage board "required that the blasting shall be conducted with all possible care, so as to avoid injury to persons and property." On the other hand the defendant contended and introduced evidence tending to show that there was no jar or vibration; that the damage to the plaintiff's house was caused by shrinkage and the manner of its construction; that he used all the care and skill that reasonably could be required, having regard to due efficiency in carrying on the work; that he had no reason to believe damage was being done to the plaintiff's house; that he took all proper precautions; and that no change in the method of blasting was possible within proper engineering practice.

The issues thus raised related exclusively to matters of fact. Beside seeing and hearing the witnesses the master states in his

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supplemental report that "In addition to the oral evidence and exhibits . . . the other material evidence taken into consideration and which was of great help to me in reaching my conclusions, was the view of the plaintiff's house and the immediate locality which I took at the request of the parties. In this way the condition of the house, the nature of the alleged damage, the location of the plaintiff's house, the situation and location of the houses of other witnesses referred to in the testimony, the location of the tunnel, and especially the geological formation and conditions of the locality, were presented to me in a more satisfactory manner than could have been done by oral evidence. It also enabled me to better understand the oral evidence."

The argument addressed to us by the defendant in his brief relates almost wholly to matters of fact. It comes, it seems to us, in substance to the contention that the master should have believed his witnesses and should have adopted his views regarding the case rather than those of the plaintiff. But that was for the master to decide. We have carefully read and considered the printed report of the evidence. It not only cannot be said that the master's findings were plainly wrong, especially when considered in connection with the view which he took, and with the advantage which he had of seeing the witnesses face to face, but they were, it seems to us, warranted by the evidence.

The result is that the decree must be affirmed, with costs of this appeal.

So ordered.

B. E. Eames, (*R. B. Hull* with him,) for the defendant.

F. H. Stewart, (*J. H. Merrick* with him,) for the plaintiff

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ABRAHAM S. BEARSE *vs.* MAX LEBOWICH & another.

Suffolk. March 18, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Pledge. Equity Jurisdiction, To compel marshalling of securities by creditor, To enforce rights of surety. *Surety. Contract,* Construction. *Evidence,* Extrinsic affecting writings. *Equity Pleading and Practice,* Memorandum, Bill, Decree.

From a memorandum of a judge who heard a suit in equity involving the question whether the relation between the plaintiff and a partnership was, as to a debt owed to the defendant, one of surety and principal, or one of joint principals, it appeared that a certain contract in writing had been made between the plaintiff and the defendant by which the plaintiff furnished to the defendant security for a debt owed to the defendant by the partnership, and that on its face the contract could have been construed as creating the relationship of joint principals between the partnership and the plaintiff, but that the plaintiff with the knowledge of the defendant furnished the security solely as an accommodation to the partnership. The judge in the memorandum stated, "I find . . . that the relations of principal and surety did not exist between the plaintiff and" the partnership. *Held,* that such statement was not a finding of a fact but was a conclusion of law.

A partnership furnished to a creditor certain security for the payment of their debt, and a third person, solely as an accommodation to the partnership, which the creditor understood, gave to him additional security and made with him a contract under seal which did not designate the third person as a surety for the partnership and which on its face could be construed as making him jointly bound with the partnership as a principal, in which case the creditor might apply to the payment of the debt the security furnished by such third person before resorting to that furnished by the partnership. *Held,* that in equity the actual relationship of the parties might be shown by evidence outside the contract in writing, that the creditor was bound by his knowledge that the third person was a surety for the partnership, and that the third person by a suit in equity against the creditor might compel him first to apply toward satisfaction of the debt the securities furnished by the partnership before resorting to those furnished by the plaintiff as an accommodation to them.

The allegations of a bill in equity were that the plaintiff, as additional security for a debt owed to the defendant by a partnership of which he was not a member, had given to the defendant his note and a mortgage of certain real estate, that without notice to or consent of the plaintiff the defendant had made a new and different agreement with the partnership as to the payment of the debt, so that the plaintiff had become entitled to a return of the note and mortgage, and that the defendant without consideration had assigned the note and mortgage to one who took them understanding the foregoing facts and who was about to foreclose the mortgage by sale. The prayers of the bill were for the enjoining of the sale, the discharge of the note and mortgage, and for general relief.

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At a hearing it appeared that the assignee of the mortgage was acting as the defendant's agent, that the defendant knew that the relationship of surety and principal existed between the plaintiff and the partnership, but that he was proceeding for satisfaction of the debt against the security furnished by the plaintiff before resorting to that furnished by the partnership. It also appeared that the defendant had not made such a new agreement with the partnership as would release the security furnished by the plaintiff. *Held*, that, although the plaintiff was not entitled to the discharge of the note and mortgage which he sought in his bill, he was entitled under the prayer for general relief to a decree compelling the defendant to marshal the securities and to apply them in satisfaction of the debt in the order in which they were chargeable.

The mere fact that a surety has not received any notice of, and has not consented to, an arrangement between the creditor and the principal debtor whereby immediate payment of the debt was not insisted upon at its maturity, payments were made from week to week and the rate of interest was changed from six to fifteen per cent, will not exonerate the surety from liability if there has been no agreement extending the time of payment for any definite period and it does not appear that such arrangement has acted to the surety's prejudice.

BILL IN EQUITY, filed in the Superior Court on November 22, 1910, against Max Lebowich and Jacob Lebowich, alleging in substance that two partners doing business under the name of Flashman Brothers, having been adjudicated bankrupt and being desirous of making a composition with their creditors, sought from the defendant Max Lebowich (hereinafter called the defendant) a loan of $14,353, for which they agreed to give security of various kinds; that the plaintiff, as further security for such loan, to be used if that given by Flashman Brothers was insufficient, gave to the defendant the assignment of a certain lease and his personal note for $7,000 secured by a mortgage on certain real estate; that, without notice to or consent of the plaintiff, the defendant entered into a new agreement with Flashman Brothers extending the time for the payment of the loan by them "and upon terms different than those originally agreed upon, whereby the plaintiff became entitled to a return of said mortgage, note and assignment of lease;" that an assignment of the mortgage and note was made without consideration to the defendant Jacob Lebowich, who knew all the facts alleged and who had begun foreclosure proceedings. The prayers of the bill, besides a prayer for a preliminary injunction against proceeding with the sale or disposing of the mortgage, note or lease, sought a delivery to the plaintiff of a discharge of the mortgage and a cancellation of the note and the assignment of the lease; and general relief.

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The suit was heard by *Hitchcock*, J., a commissioner having been appointed under Equity Rule 35 to take the evidence. The judge filed a memorandum and a report of material facts containing in substance the following findings and rulings:

The plaintiff in this case is a brother in law of Simon and Jacob J. Flashman, who were engaged in business under the name of Flashman Brothers.

Flashman Brothers had gone into bankruptcy, and while the bankruptcy proceedings were pending they made an offer of composition with their creditors. In order to make this composition, they were obliged to raise about $13,000 and applied to the defendant, who was engaged in the business of lending money, for a loan of that amount and offered to him certain securities. He was willing to make the loan but wanted more security than Flashman Brothers could give, and wanted some real estate security.

The preliminary negotiations resulted in certain written agreements which were entered into by the various parties, material among which were an agreement between Flashman Brothers and the defendant and an agreement between the plaintiff and the defendant; and in an assignment of a lease by the plaintiff and one Hannington to the defendant, and the giving of the note and mortgage referred to in the bill of complaint. All these writings and agreements were dated September 23, 1909.

The agreement between Flashman Brothers and the defendant was embodied in a contract under seal which in substance provided that the defendant lent to Flashman Brothers $13,000 and went to an expense of $1,353 additional for them, and that Flashman Brothers agreed to repay to him the $14,353 as follows: $250 on November 23, 1909, and $250 each and every consecutive month thereafter, with the balance of the $14,353 to be paid in six months from the date of the agreement, with interest at the rate of six per cent per annum to be paid on the dates when the payments on the principal were to be made; that Flashman Brothers conveyed to the defendant eight kinds of security furnished by them for the performance of their agreement, and also the assignment of the lease and note and mortgage of the plaintiff, the defendant to have the use of the securities in any way he saw fit, but, on payment of the $14,353, to return to Flashman Brothers

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the securities furnished by them and to the plaintiff those furnished by him.

The agreement between the plaintiff and the defendant also was embodied in a contract under seal, and by it the plaintiff conveyed to the defendant the assignment of a lease and the note and mortgage, already described, as security for the payment of the debt owed to the defendant by Flashman Brothers; and on payment of that debt the defendant agreed to discharge the note and mortgage, to reassign the lease to the plaintiff and to convey to him all the securities which Flashman Bros. had given to the defendant, "the same to be held by said Bearse as collateral security for the payment to him of any and all sums that may be due to him from said Flashman Brothers and Flashman Bros., Inc." Appended to this agreement was a statement under seal by Flashman Brothers and Flashman Bros., Inc., acknowledging that the plaintiff had a lien, subject to the rights of the defendant Lebowich, upon the collateral security which they had furnished to the defendant, and assenting to the transfer by the defendant to the plaintiff of such collateral upon the payment of the loan to the defendant. "The securities deposited by the plaintiff with the defendant Max Lebowich, to wit, the mortgage and assignment of lease referred to in the bill of complaint, were deposited for the purpose of providing more security than Flashman Brothers could give and for the accommodation of Flashman Brothers, and that fact was known to the defendant Max Lebowich."

The place of business of Flashman Brothers was closed at the time these agreements were made and remained closed until the latter part of February in the year 1910, and payments were not made upon the agreement between them and Lebowich in accordance with its terms; but at the time when the place was reopened in February, 1910, a payment of $1,040, together with $82 of rent, amounting in all to $1,122, was made. At the expiration of the six months the balance due under the agreement was not paid, Flashman Brothers being unable to pay it. The defendant at that time requested payment of Flashman Brothers, but at that time did not make any demand upon or give any notice to the plaintiff in reference to the non-payment of the original loan, nor did he attempt to make any collection; he let the matter run along upon an agreement on the part of Flashman Brothers

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that they would make payments at the rate of $100 a week, which were made for several weeks, and then later that they would make payments of $100 every two weeks, and with a demand on the part of the defendant and agreement on the part of Flashman Brothers that the rate of interest after the expiration of the agreement should be at the rate of one and one fourth per cent a month, or fifteen per cent a year. There was no agreement between Flashman Brothers and the defendant that the time of payment should be extended for any definite period. The rate of interest agreed upon was different from that which could have been recovered upon the agreement. The plaintiff knew subsequently to the expiration of the time limited in the agreement that payments were being made by Flashman Brothers at the rate of $100 every week or every two weeks.

The defendant Jacob Lebowich in attempting to foreclose the mortgage referred to in the bill of complaint, acted as the agent of the defendant Max Lebowich and is not a holder of said mortgage for value.

The judge's memorandum continues: "There seem to be two principal questions involved in this case. First, was the security which was furnished by the plaintiff furnished as a collateral security for the loan which the defendant made to Flashman Brothers, or was it furnished as a special security or in the nature of surety to be availed of only after the other securities were exhausted? . . . I find that the securities furnished by the plaintiff to the defendant were furnished merely as collateral securities for the loan made by the defendant to Flashman Brothers, and that the relations of principal and surety did not exist between the plaintiff and Flashman Brothers, and that there was no agreement on the part of the defendant to exhaust other securities before availing himself of the security furnished by the plaintiff.

"The next question involved in the case is, was the security furnished by the plaintiff, namely, the mortgage and note and the assignment of lease, of such a nature that the plaintiff would be released from any liability thereon, or that the security would be released, by any failure on the part of the defendant to collect the indebtedness of Flashman Brothers to him at maturity, or by any extension of time therefor or by any change in the terms thereof without the knowledge of the plaintiff? I find and rule that the

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plaintiff is not released from liability, and is not entitled to relief as prayed for.

"The defendants are entitled to a decree that the bill be dismissed, and it is so ordered."

A final decree dismissing the bill was entered accordingly; and the plaintiff appealed.

A. K. Cohen, for the plaintiff.

J. Lebowich, for the defendants.

BRALEY, J. The trial judge, whose finding is not disputed, having decided, that the defendant, Jacob Lebowich, by whom the foreclosure proceedings were instituted, was not a purchaser for value of the mortgage, but acted only as the agent of the defendant Max Lebowich, the question is, whether under the frame of the bill, and upon the evidence reported, the plaintiff, who is the mortgagor, is entitled to equitable relief.

It is true, that on the face of the agreement in writing signed by the plaintiff he is not designated as a surety for the copartnership described as Flashman Brothers, whose indebtedness to this defendant was thereby secured not only by a pledge of personal property of their own, but by the note and mortgage in question, with an assignment of a lease furnished by the plaintiff. The terms of this instrument show, that he did not become obligated in any form as the defendant's debtor. It is, however, under seal, and although the plaintiff did not engage to pay the debt, the defendant contends, that in the marshalling of securities he jointly bound himself with the debtors as a principal, and upon their default and at his election he can apply in liquidation the proceeds of the mortgage, the attempted foreclosure of which the bill seeks to enjoin, before resorting to the security given by the partnership. But if the contract itself can be thus construed it has been abundantly settled, that in equity the actual relations of the parties between themselves can be proved by extrinsic evidence, and whenever the relation of surety and principal is established, and the creditor has notice of the fact, he is as much bound by this knowledge, as if the suretyship had been disclosed by apt recitals in the contract with his debtor. *Guild* v. *Butler*, 127 Mass. 386, 389. *Goodwin* v. *Massachusetts Loan & Trust Co.* 152 Mass. 189, 192.

It remains to apply this principle to the facts in the present

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case. The evidence warranted the findings, that with the defendant's knowledge the mortgage was given, and the lease assigned for the purpose of providing additional security which the debtors were unable to supply, and that they were furnished solely for their accommodation. It was a question of law under these findings, and not a question of fact as the defendant further urges, whether the plaintiff became a surety and his securities were held subject to the equities existing between himself and his principals. And the further conclusion of the judge that the plaintiff did not sustain this relation is to be treated as in the nature of a ruling of law which was erroneous. *Campbell* v. *Cook*, 193 Mass. 251, 256, 257.

Upon the debtor's default the defendant possessed two funds for his protection, and the satisfaction of the debt. No rights of strangers having intervened, the plaintiff upon tender and payment of the amount due would have been subrogated to the defendant's title, and could have enforced it for the purpose of self-protection. The plaintiff, however, who had the equitable rights of a surety as to the mortgaged property, can have his interests preserved not only by subrogation but by having the property pledged by himself and the partnership marshalled and applied in satisfaction of the debt of the principal in the order in which they are chargeable. It accordingly became the defendant's duty in the first instance to exhaust the security provided by the debtors to which the plaintiff could not resort, before compelling him to redeem from the mortgage or suffer the loss of the estate. *American Bank* v. *Baker*, 4 Met. 164, 175. *Guild* v. *Butler*, 127 Mass. 386. *Kelly* v. *Herrick*, 131 Mass. 373. *Worcester Mechanics' Savings Bank* v. *Thayer*, 136 Mass. 459, 462. *Wilson* v. *Bryant*, 134 Mass. 291, 297. *King* v. *Nichols*, 138 Mass. 18, 21. *Kidd* v. *Hurley*, 9 Dick. 177. *Cuyler* v. *Ensworth*, 6 Paige, 32. *Arnold* v. *Green*, 116 N. Y. 566. *Aldrich* v. *Cooper*, 8 Ves. 382, 395. *Heyman* v. *Dubois*, L. R. 13 Eq. 158. *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App. Cas. 1, 19; Pom. Eq. Jur. (3d ed.) §§ 1414, 1417, 1419. The plaintiff under the prayer for general relief can enforce this equitable right and compel the defendant to marshal and apply the securities and during liquidation the mortgage sale may be enjoined. *Franklin* v. *Greene*, 2 Allen, 519. *Hayes* v. *Ward*, 4 Johns. Ch. 123. *Thompson* v. *Taylor*, 72 N. Y. 32. *Irick* v.

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Black, 2 C. E. Green, 189. *Skinner* v. *Terhune*, 18 Stew. 565. *Wooldridge* v. *Norris*, L. R. 6 Eq. 410. *Allis* v. *Ware*, 28 Minn. 166. *Trentman* v. *Eldridge*, 98 Ind. 525. *Stafford* v. *Montgomery*, 85 Tenn. 329.

The plaintiff also contends, that he has been exonerated from all liability by the defendant's forbearance to press promptly the collection of the loan at maturity. But a perusal of the evidence supports the judge's finding, that no definite extension of time had been granted, although it was understood that a different rate of interest should be charged while payment was delayed. The collateral has not been surrendered, and the change in the rate of interest would seem not to have been detrimental to the plaintiff, yet if finally a loss results, his liability would be diminished to that extent only and he fails to show affirmatively any prejudicial acts by the defendant sufficient to release him. *Allen* v. *Brown*, 124 Mass. 77. *Watertown Fire Ins. Co.* v. *Simmons*, 131 Mass. 85. *Welch* v. *Walsh*, 177 Mass. 555. *Boston Penny Savings Bank* v. *Bradford*, 181 Mass. 199. *North Avenue Savings Bank* v. *Hayes*, 188 Mass. 135, 137, 138. *Mercantile Guaranty Co.* v. *Hilton*, 191 Mass. 141. *Cumberland Glass Manuf. Co.* v. *Wheaton*, 208 Mass. 425, 432. *Wakefield* v. *American Surety Co.* 209 Mass. 173, 177. *Gordon* v. *Third National Bank*, 144 U. S. 97.

It results from what has been said, that the decree dismissing the bill must be reversed, and a decree is to be entered enjoining the foreclosure of the mortgage until the defendant has applied in such form as the Superior Court after hearing the parties may direct, the securities pledged by the debtors, and if the amount realized is insufficient to discharge the debt with interest, and whatever costs and charges may have been properly incurred, the plaintiff may redeem upon payment of the difference, with such further decree or decrees as that court may adjudge to be necessary or expedient.

Decree accordingly.

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NELLIE C. RANDALL, administratrix, *vs.* PEERLESS MOTOR CAR COMPANY.

Suffolk. March 22, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Interlocutory order, Exceptions, Auditor's report, Conduct of trial: requests and rulings, New trial, Mistake of jurors, Verdict, Brief before full court. *Jury and Jurors. Contract,* Performance and breach, Construction. *Agency,* Exclusive. *Damages,* In contract: loss of prospective profits. *Evidence,* Opinion: experts, Declarations of deceased persons, Photograph. *Words,* "Best energies."

After a hearing on a motion in an action of contract asking that a report of an auditor be recommitted and certain parts of it be stricken out, a paper entitled an "order" was filed by the justice who heard the motion, which, after detailed comments in four numbered paragraphs as to the parts of the report referred to in the plaintiff's motion and after statements of rules of law bearing thereon and of what conclusions as to the parts of the report in question would "seem" to follow from such comments and rules, concluded as follows: "The report is recommitted to the auditor to consider further the first four matters mentioned above. The auditor may consider further any other matters which he thinks ought to be further considered in connection with these matters or not in connection with them." In considering exceptions alleged by the defendant "to the rulings in the first four paragraphs of the . . . memorandum," *it was doubted* whether the main part of the paper called an "order" was anything more than a "memorandum," the contents of which would not be subject to exception.

At the trial before an auditor of an action for an alleged breach of a contract in writing which required the plaintiff to do certain things before a certain date, it appeared that ten days before that date the defendant had refused further to be bound by the contract. The auditor refused to admit evidence as to the ability of the plaintiff to perform what was required of him before the date in question, but in his report discussed that question. *Held,* that such discussion in the report of a question as to which evidence was excluded was improper.

Where, in an action for an alleged breach of a contract in writing which required the plaintiff to do certain things before a certain date, it appears that before that date the defendant refused further to be bound by the contract, it is immaterial on the issue of the breach of the contract whether the plaintiff would have been financially able to perform what the contract required of him on the date designated.

In recommitting an auditor's report in an action of contract, it is proper for the court, with regard to a request of the moving party that the auditor be given instructions as to what rule of damages he should follow, to rule that "the

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time has not come for the court to lay down the rule of law as to the damages which the plaintiff is entitled to recover, if he is entitled to recover."

An auditor to whom an action of contract is referred is not required in his report to make findings of subsidiary facts or a detailed statement of all the contentions of the parties.

The denial of a motion for the recommittal of an auditor's report, where such denial involves no ruling upon a question of law, is within the absolute discretion of the court.

In an action of contract where an auditor's report has been admitted in evidence without objection, in which the auditor upon questions of fact finds for the plaintiff for substantial damages, it cannot be ruled as a matter of law that the plaintiff is entitled only to nominal damages.

In June of a certain year a manufacturer of automobiles made an agreement in writing with a dealer whom he appointed his "exclusive agent" for a year beginning the following January 1 for a specified territory, the dealer ordering at once from the manufacturer twenty-five touring cars and agreeing to pay a certain part of the purchase price on or before February 1. Afterwards the parties made a collateral and subsidiary agreement by which the manufacturer was to furnish a demonstrating car to the dealer and the dealer before January 1 was to give to the manufacturer specifications and make deposits for three cars other than the twenty-five named in the main contract. The demonstrating car furnished by the manufacturer was not such as was contemplated by the parties. The dealer did not give specifications or make deposits for the three extra cars before January 1. On January 21 the manufacturer refused further to be bound by the main contract. In an action by the dealer upon the main contract, it was *held*, that failure of the dealer to give the specifications and make the deposit before January 1 as to the three cars not included in the main contract did not justify the manufacturer in repudiating the main contract.

A manufacturer of automobiles made with a dealer, who he knew maintained a salesroom and a repair shop for the sale and repair of bicycles and motorcycles in Boston, a contract in writing appointing him his "exclusive agent for the sale of " his "motor cars" in the New England States for a year from a January 1, the contract leaving it to the dealer to conduct the business in his own way, requiring the dealer to maintain "proper salesrooms and repair and storage rooms for the transaction of the business" contemplated by the contract, to carry in stock at all times "at said store one or more new motor cars" of the manufacturer and "such reasonable supplies as may be necessary for replacing parts of motor cars sold by" the dealer "or repairing such cars." The contract also required the dealer to make an advance payment before February 1 upon the purchase price of twenty-five automobiles of the manufacturer ordered by the dealer contemporaneously with the making of the contract. The only return provided for the dealer was a "commission or discount" on the sale price of motor cars of the manufacturer. The contract also required that the dealer "devote his best energies to the sale of the product of the" manufacturer. *Held*, that "best energies" meant such efforts as in the exercise of sound judgment would be likely to produce the most profitable results to the manufacturer in view of the nature of the business and the extent of territory over which it was to be conducted. *Held, also*, that the dealer was not precluded by the contract from making an agreement to act as agent for the sale in the same territory of automobiles of other manufacturers which did not compete with

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those described in his contract with the first manufacturer, but that he was precluded from making such an agreement as to a car competing with the first manufacturer's.

In determining whether in selling certain motor cars an agent was breaking a contract with a manufacturer which prohibited his selling cars which competed with those of the manufacturer, competing cars here were defined as those so similar in cost, design, size, power, carrying capacity and other characteristics as fairly to leave ordinary and reasonable customers in such doubt in making a choice between them as to permit the skill of a salesman to become a determining factor.

A repudiation of a contract of agency by a principal is justified if the agent by a contract with a third person has placed himself under legal obligations inconsistent with those assumed under the pre-existing contract, even though at the time of the repudiation no actual injury has been suffered by the principal and he did not know of the existence of the contract with the third person.

By the provisions of a contract between a manufacturer of and a dealer in automobiles the dealer was appointed the "exclusive agent" for the sale of the manufacturer's automobiles in the New England States for a year beginning on a January 1, and was required to devote his "best energies" to the promotion of the sales of such automobiles. Contemporaneously with the making of the contract and as a part thereof the dealer ordered twenty-five automobiles of the manufacturer, and the contract required that before February 1 he should make specified payments on account of, and furnish specifications regarding, such automobiles. On January 21 the manufacturer withdrew from the dealer his authority longer to act as his agent in Boston. *Held*, that such act of the manufacturer was an instant breach of the contract, and that no further performance by the dealer could be required as a condition precedent to his right to maintain an action against the manufacturer.

At the trial of an action against a manufacturer of automobiles for an alleged breach of a contract by which the manufacturer appointed the plaintiff his "exclusive agent" for the sale of his automobiles in the New England States for a year, evidence is admissible tending to show that during the first month of the year at an automobile show in the city of New York which prospective purchasers from New England among others were attending, persons in the employ of the defendant and in charge of his booth at the show solicited residents of New England to purchase automobiles directly from the defendant and not through the plaintiff, stating that the plaintiff no longer was the manufacturer's New England agent; and, if evidence is introduced tending to show the existence of a custom assented to by the plaintiff whereby at such show other agents than the plaintiff were permitted to make sales in his territory and that such sales were credited to the plaintiff, it is sufficiently favorable to the defendant for the trial judge to leave the weight of such evidence to the jury and to charge them that, in the absence of such a custom, such sales and other conduct by the defendant's authorized agents would constitute a violation of the defendant's obligation under the contract.

It is too late at the argument before this court of exceptions to the admission at a trial of certain evidence and to a certain portion of the charge to the jury, to urge as a ground for the sustaining of the exceptions that the subject with which the evidence and the portion of the charge in question dealt was not open under the pleadings, if no such ground was urged at the trial.

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An auditor to whom an action of contract has been referred properly may include in his report statements of the conflicting contentions of the parties on the subject of damages in order to show the wide variation in the evidence and to indicate that his findings, which differ from the contentions of both parties, are not the result of complete credence of the evidence of either side.

In an action for a breach of contract loss of prospective profits may be recovered when such loss appears to have been within the contemplation of the parties to the contract as a probable result of a breach, to have been its natural, primary and probable consequence, and to be susceptible of proof by evidence reasonably certain and not resting chiefly on speculation, conjecture or surmise.

In an action for a breach of a contract it is not necessary in order that damages resulting from a loss of prospective profits may be recovered, that they should be capable of calculation with mathematical accuracy.

In an action against a manufacturer of automobiles for a breach of a contract in writing by which the defendant appointed the plaintiff his "exclusive agent" for the sale of his automobiles in the New England States for a year, it appeared that the contract was repudiated by the defendant in the first month of the year, and the plaintiff claimed as an element of his damages loss of prospective profits. Contemporaneously with the making of the contract and as a part of it, the plaintiff ordered twenty-five automobiles of the defendant. The only provision of the contract as to the plaintiff's compensation was that "upon all sales" of the defendant's cars, "parts of [and] supplies therefor made hereunder to the" plaintiff, "a commission or discount" of twenty per cent from the defendant's "list prices, as they may be fixed from time to time, shall be allowed" to the plaintiff. *Held*, that the inference was warranted that loss of profits was likely to follow as a reasonable and probable consequence of a repudiation of the contract by the defendant.

A manufacturer of automobiles, who had made a contract in writing with a dealer appointing the dealer his "exclusive agent" for the sale of his automobiles in the New England States during the year beginning January 1, 1903, repudiated the contract on January 21. In an action by the dealer for the breach of the contract, the dealer claimed as an element of his damages loss of prospective profits. The contract provided as the plaintiff's compensation a certain percentage of the sale price of the defendant's automobiles. The plaintiff was to pay practically all the expenses of the agency. At the trial, there was evidence tending to show that the business of selling automobiles, although it then was new, was not absolutely uncertain, that the plaintiff was intimately acquainted with that branch of the trade, was an expert mechanic and had a large number of subagents working or ready to work in soliciting orders for him in various parts of his territory, and that the defendant's automobile had acquired a reputation as a representative car. It appeared that the defendant during the year 1903 had sold thirty-seven cars, and there was definite evidence as to the number of sales made by the plaintiff of another non-competing car after the defendant repudiated the contract and of sales by other persons of other competing cars, as well as what would have been the expense to the plaintiff of conducting the business of the defendant's agency. *Held*, that a finding was warranted that as a natural and probable consequence of the breach of the contract the plaintiff had lost prospective profits the amount of which was capable of reasonable ascertainment.

A manufacturer of automobiles made a contract in writing appointing a dealer his "exclusive agent" for the sale of his cars in a certain territory for a year. The

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contract did not prevent the dealer from also acting as agent for cars not competing with the manufacturer's. The dealer made with a second manufacturer a contract to act as agent for the sale of his cars in the same territory during the same period. The first manufacturer repudiated his contract. At the trial of an action by the dealer for a breach of the first contract, it appeared that the plaintiff continued throughout the year to act as agent for the second car and his profits from that agency were shown. There was evidence tending to show and other evidence tending to disprove that the second car was a car competing in the market with the first. The defendant contended that as matter of law the profits made by the plaintiff from the sale of the second car should be considered in mitigation of damages. *Held*, that the contention could not be sustained, because, if the second car was found to be a car competing with the first in the market, there was no breach of the contract by the defendant; and if it was a non-competing car the plaintiff properly might have sold both cars during the same period and in the same territory.

A manufacturer made with a dealer a contract in writing appointing the dealer his "exclusive agent" for the sale of his product in a certain territory for a year beginning on a January 1. Contemporaneously with the making of the contract and as a part of it the dealer ordered a certain amount of the product and the contract provided that he should make certain advance payments therefor on or before February 1. The manufacturer repudiated the contract on January 21. In an action by the dealer against the manufacturer for breach of the contract, it was *held* that, if on January 21 the dealer was in such financial condition that it would have been impossible for him to make the payments on February 1, the plaintiff could not recover substantial damages.

Where requests for rulings and instructions submitted to the judge by a party to an action on trial at the close of the evidence are voluminous and numerous, it is not a proper method of saving exceptions to the failure or refusal of the judge to grant some of the requests, for the excepting party at the close of the charge to the jury to ask generally that his exceptions be saved to the refusal of the judge to grant such requests as had not been covered by the charge, without first pointing out the requests for rulings which he contended had not been given.

At the trial of an action by a dealer against a manufacturer of automobiles for a breach of a contract appointing the plaintiff the defendant's "exclusive agent" for the sale of his automobiles for a certain period in a specified territory, it appeared that the contract required that the plaintiff make certain payments on a certain day. The defendant repudiated the contract ten days before that day. At the trial of the case before an auditor the defendant contended that at the time when he repudiated the contract it was evident that the plaintiff would be unable to make the payments when they were due, and a first report of the auditor contained comments on that phase of the case. That report was recommitted to the auditor and such comments were stricken out by him. Thereafter that issue dropped out of the case as a distinct subject for controverted evidence although there was some evidence which, liberally construed for the plaintiff, might be taken to mean that the plaintiff was able to procure money to meet the obligation when it became due. At the close of the evidence the defendant submitted requests for rulings and instructions, which were very numerous, voluminous and multifarious, and one of which, numbered fifty-three, was that "the burden is upon the plaintiff in order to recover damages to show that"

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the plaintiff "was able and willing" to make the payments on the date specified. The ruling was not given in the charge. After the charge the defendant's counsel, without objection on the part of the judge, excepted generally to the failure or refusal of the judge to give such requests as were not given therein. *Held*, that the defendant's exception to the refusal or failure by the judge to give the fifty-third request must be overruled since under all the circumstances the error was immaterial.

Where an exception to evidence is not taken until after the evidence has been introduced and no motion is made to strike out the evidence, the exception must be overruled although the evidence was inadmissible because of incompetency.

A manufacturer of automobiles repudiated in January a contract with a dealer whereby he had appointed the dealer his "exclusive agent" for the sale of his product in a certain territory for a certain year. At the trial of an action by the dealer against the manufacturer for such breach of the contract, there was definite evidence on the question of damages as to the number of automobiles of several makes sold during the year in question in the territory specified and of many other facts from which a fairly definite inference could have been drawn by the jury as to the number of automobiles the plaintiff would have sold for the defendant during the year of the contract. The defendant offered testimony from several witnesses as to their opinion of the number of automobiles the plaintiff would have sold in that time. The evidence was excluded. *Held*, that the circumstances were such that the exclusion of expert testimony was justified.

An exception to the exclusion of evidence by a trial judge will be overruled if the exclusion was proper for any reason, irrespective of the reason which the trial judge gave for excluding it.

Declarations made in good faith and on the personal knowledge of the declarant before the beginning of an action by him are admissible in evidence under R. L. c. 175, § 66, at a trial of the case after the death of the declarant, although before his death he had testified at a previous trial.

The plaintiff in an action by an automobile dealer against a manufacturer for a breach of a contract by the provisions of which the dealer was appointed the defendant's "exclusive agent" for the sale of his automobiles in a specified territory for a year, died before the case was tried and the administrator of his estate prosecuted the action in his stead. At the trial it appeared that the defendant repudiated the contract during the first month of the year during which the agency was to continue, and an issue was, how many of the defendant's automobiles the plaintiff would have been able to sell during the year. As bearing on that issue the trial judge admitted in evidence a photograph of the dealer which, it was testified, was a "very good picture" of him at the time covered by the contract, and the defendant excepted. *Held*, that the exception must be overruled because, while the discretion of the judge would have been exercised more wisely by the exclusion of the photograph, it could not be said that his admission of it was plainly wrong.

A general exception to the admission of certain evidence at a trial will be overruled if the evidence was admissible upon any issue.

Where, after very extended testimony by a plaintiff at a trial of an action before an auditor where his testimony was taken down by a stenographer, the plaintiff dies and, at a trial of the case before a jury each of the counsel for the respective parties thinks that portions of such testimony which the other desires to read are immaterial but they cannot agree as to what portions shall be omitted, it is proper

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for the presiding judge, in the exercise of his judicial power as to the order of proof and for the purpose of shortening the reading of all of the testimony, to permit each counsel in turn to read such of it as he desires without waiving his right to object to any of that read by the other counsel.

Under the rule of law that the conduct, motives or grounds of action of jurors in the jury room are not open to subsequent investigation by examination of the jurors, but that their testimony may be received to show that an error was made in the recording of the result of their deliberations after it was reached, affidavits of all the members of a jury made after their separation, stating that they intended that the answer to a special question submitted to them, which was recorded in the negative, should be in the affirmative, are competent evidence in support of a motion to have the answer to the question set aside; but a sentence added at the end of the foreman's affidavit in which he stated what question he put to the jury during their deliberations and what their answer was, is not competent. In this case no objection was made to the incompetent part of the foreman's affidavit, and, being separable, it was held not to have rendered the entire affidavit inadmissible.

Where a jury, in recording their answer to one of several questions submitted to them by the presiding judge, make a clerical error in that they answered the question in the negative, which was favorable to the defendant, instead of in the affirmative, as they intended to, and their general verdict is in favor of the plaintiff, and the error escapes the attention of the judge and of both of the parties at the time the verdict is recorded, a motion by the plaintiff to have that answer set aside may be allowed without the general verdict being affected.

Where, at the argument of a motion by a plaintiff to set aside a negative answer of the jury to a special question put to them by the judge on the ground, which was the fourth stated in the motion, that, as shown by affidavits of all the jurors, they had intended to answer the question in the affirmative and the answer recorded was a clerical error, the judge orally stated, "I shall rule that [the affidavits] are admissible, and if admissible, the finding is set aside. . . . The general verdict stands." The defendant excepted to both such rulings. Subsequently the judge indorsed upon the motion "Motion allowed on the fourth ground, if affidavits are legally admissible. Otherwise motion disallowed." Thereafter the judge changed the indorsement by striking out the words "if affidavits are legally admissible. Otherwise motion disallowed," so as to make the statement accord with the original oral ruling. *Held*, that the indorsement as first made was inoperative as an adjudication on the motion, because it failed to express the unequivocal oral ruling earlier made, and that no error was committed by the judge in correcting the indorsement so that it conformed to the oral ruling.

At a trial special questions were submitted to the jury and were answered by them. After the verdict the plaintiff filed a motion that the answer to one of the questions be set aside because through a clerical error it incorrectly recorded the jury's answer. The defendant filed a bill of exceptions taken at the trial. Pending the allowance of the bill of exceptions there was a hearing on the plaintiff's motion at which the judge orally ruled that the motion be granted. Later the judge changed his ruling and made an indorsement on the motion which was a conditional ruling and not a final adjudication upon the motion, and then, again changing his mind, before the bill of exceptions was allowed he amended the indorsement to accord with his former oral ruling. *Held*, that such proceedings did not cause harm to the defendant.

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If a defendant files a bill containing exceptions to rulings made at a trial and on a motion subsequent to the trial, and subsequently files another bill setting forth exceptions to some of the rulings made after the trial which are contained in the first bill, and the first bill is allowed, the second bill, so far as it relates to matters covered by the first, should be disallowed.

Where a party to an action files a bill of exceptions containing two subjects distinguishable without difficulty, of which one improperly is included in the bill and the other properly is included and is truly stated, the bill should be disallowed as to the subject improperly in the bill and allowed as to the other subject.

It is improper to include in a brief filed in this court at the argument of exceptions taken at a trial of an action in the Superior Court reference or comment as to the disappearance of letters which, in accordance with a stipulation of the parties, the trial judge has stated to the jury had "been lost, without fault on the part of any person whatsoever;" and if a brief of one party to the action improperly contains such matter, a motion by the other party made at the argument of the exceptions to have such matter stricken from the brief will be granted.

At the trial of an action of contract by a dealer against a manufacturer it appeared that the defendant and the plaintiff had made a contract in writing by which the plaintiff was appointed the defendant's "exclusive agent" for the sale of his goods throughout a certain territory for a year, and that the contract did not prevent the plaintiff from becoming selling agent for manufacturers of goods which did not compete in the market with goods of the defendant. The plaintiff had made with another manufacturer a contract by which he became selling agent for his goods in the same territory and during the same period, and one of the questions at issue at the trial was whether the goods of the second manufacturer competed in the market with those of the defendant. There was a long trial resulting in a verdict for the plaintiff for $14,000. The judge erred in charging the jury on the subject of the possible effect of the contract with the second manufacturer. In all other respects the trial was without error. In sustaining exceptions of the defendant *it was ordered* that the new trial should be confined to the single issue, whether the goods of the second manufacturer did or did not compete in the market with those of the defendant, judgment to be entered for the defendant if it was found that they did, and judgment to be entered on the previous verdict for the plaintiff, if it was found that they did not.

CONTRACT for alleged breaches of the contract in writing given below. Writ in the Supreme Judicial Court, dated January 30, 1904.

The original plaintiff was Frederick E. Randall. He died while the action was pending and the administratrix of his estate was admitted as plaintiff to prosecute the action.

The contract in question was as follows:

"This memorandum made at Cleveland, Ohio, this 7th day of June, 1902, by and between the Peerless Manufacturing Company*

* This contract afterwards was assumed by the defendant, a successor of the Peerless Manufacturing Company.

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of Cleveland Ohio, party of the first part, and Frederick E. Randall of Boston, Mass. party of the second part.

"Witnesseth: That whereas the first party is engaged in the business of manufacturing and selling Motor Cars and the second party is desirous of becoming the exclusive agent of the first party for the sale of its Motor Cars in the territory included in the New England States.

"Now, therefore, the first party agrees to and does hereby appoint the second party as its exclusive agent for the sale of said Motor Cars in the aforesaid territory for the period of one year from January 1st, 1903, and agrees that it will furnish to the second party in reasonable quantities such circulars, catalogues and other printed matter as it may publish, and that in its general advertising, wherever practical, it will mention the address of the said agent for the above territory. The said second party shall do all local advertising at his own expense, unless mutually agreed otherwise.

"The second party further agrees to maintain at a suitable location in the City of Boston, Mass, proper salesrooms and repair and storage rooms for the transaction of the business herein contemplated, and carry a stock at all times at said store for exhibition and demonstration, one or more new motor cars manufactured by first party, and to carry in stock in said store at all times such reasonable supplies as may be necessary for replacing parts of Motor Cars sold by second party or repairing such cars.

"The second party further agrees to order from the first party upon the execution of this contract not less than twenty-five of the said Cars, complete specifications to be made before February 1, 1903. First party's letter of June 3 and second party's written order of June 3, 1902, to be part of this contract.

"It is agreed that upon all sales of two cylinder Motor Cars, parts of supplies therefor made hereunder to the second party, a commission or discount twenty percent (20%) from the first party's list prices, as they may be fixed from time to time, shall be allowed to the second party, such prices being net F. O. B. cars at factory at Cleveland, Ohio.

"Payments for all such sales are to be made by second party as follows: Ten percent (10) net price of all orders is to be forwarded to the first party with such orders; twenty percent (20%)

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of the net price of shipment when the first party shall notify second party that car or cars shall be shipped in twenty days; ten percent (10%) interest to be paid to second party on all said payments for all time over twenty days after receipt of second party's check; the remainder to be paid in such instance in case where any shipment is ready for delivery.

"Said second party agrees to devote his best energies to the sale of the product of the first party and to secure orders for the same as far in advance of delivery dates as possible, and to canvass through his territory and introduce said product therein; he agrees to refer promptly to the first party all inquiries received from territory other than . . . own, and that he will not, except by special permission in writing from the first party, sell or deliver any of such products in any territory other than his own.

"The second party shall be prepared at all times to receive promptly all Cars and goods ordered by it and the first party may require the receipt and acceptance thereof by the second party of any order within ninety (90) days from the time such order shall be given, unless otherwise mutually agreed.

"It is further agreed between the parties hereto that should the second party fail to secure sales of the product of the first party commensurate with the sales of other Cars within said territory, first party may terminate this contract on thirty days' notice in writing to second party. This contract may be terminated by the second party on thirty days' written notice to the first party.

"The first party shall not be liable for any failure to perform any obligations herein assumed by it which may be caused by fire, strikes or insurrections or other causes beyond its control." Here followed the signatures of the parties.

The defendant's letter of June 3, referred to in the contract, was as follows: "In consideration of an order for 25 (twenty-five) Peerless motor cars to be taken between Feb. 1, 1903 and July 1, 1903 we agree to give you the exclusive agency for the New England states for 1903 at present contract discounts from our list prices as fixed from time to time. Advance payment of 10% to be paid on above order on or before Feb. 1, 1903 unless some of such cars are ordered for delivery before that date, advance on such cars to be paid 30 days before shipping date, terms on the

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remaining 90% of price to be as at present. In case we are unable to deliver machines on dates later agreed upon we agree to refund on demand advance payments on such machines."

The letter of Randall of the same date was as follows: "Please enter our order; 25 Peerless Motor Cars to be delivered between Feb. 1, 1903 and July 1, 1903, specifications to be decided on after Jan. 1, 1903."

The case was referred to Henry V. Cunningham, Esquire, as auditor. He filed a report which, after a summary of the pleadings and a narrative of events leading up to the making of the contract in question and a setting out of the documents containing the contract, continued as follows:

"During the remainder of the year 1902 and until the New York automobile show in January, 1903, Randall went ahead under this agency contract. He advertised the 1903 model car and tried to interest people in it. He negotiated with various people and made appointments to demonstrate, which appointments he was not able to keep because of unfavorable weather. He sent out advance Peerless circulars upon which he was described as the agent of this company. He appointed representatives in Worcester, Springfield, Providence and New Haven.

"On January 17, 1903, the automobile show opened in Madison Square Garden in the city of New York, which Randall attended at the opening and where he remained during the entire show. At this show on January 21 the Peerless Company without right terminated Randall's agency and immediately afterwards leased a store at 178 Columbus Avenue, Boston, and opened there a branch sales room and continued its business on these premises during the year 1903, during which time it sold in the New England territory thirty-nine automobiles.

"On January 17, 1903 Randall made an arrangement with the Stevens-Duryea Company to represent it in New England for the year 1903. The Stevens-Duryea Company manufactured and sold at that time an automobile called a runabout which did not compete with touring cars, the type of automobile manufactured and dealt in by the Peerless Company. During the year 1903 Randall represented the Stevens-Duryea Company in New England and was also the New England agent for the Indian Motor Cycle Company.

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"On January 21, 1903 Randall did not have sufficient funds of his own with which he could pay to the Peerless Company on February 1 the deposit required under his agreement, and in November 1902 he stated to Mr. Kittredge, the general manager of the Peerless Company, that he did not wish to borrow money to conduct his business. Neither did Randall show that he was then ready with any of the specifications for the remaining twenty-four cars which he was to furnish to the company before February 1, 1903."

Then followed in the auditor's report a statement of Randall's contentions as to the proper method for the estimation of his damages based on the fact that the defendant had sold thirty-seven cars in the territory covered by the contract during the year 1903, and then these paragraphs:

"The automobile business at this time was comparatively new and the Peerless Company's Motor Car but recently placed upon the market.

"The case of *Garfield* vs. *The Peerless Motor Car Company* [189 Mass. 395,] was relied upon by Randall as setting forth the rule of damages to be followed in this case. This case may be distinguished from the Garfield case owing to the fact that Randall's agency was terminated and this action is for a breach by a termination of the contract without right."

Then followed the contentions of the defendant as to the basis for the estimation of damages, and the following paragraphs:

"If Randall has brought his suit at the time the breach occurred the damages might well be said to be conjectural and speculative.

"These thirty-seven cars, however, were sold during the contract period and in this territory.

"The claims by Randall as to estimated profits on repairs, parts, oil, gasolene, tires and sundries are so conjectural and speculative that I find and rule that Randall is not entitled to recover therefor. If upon the foregoing facts he is entitled to recover commission upon all the cars sold in New England during the year 1903, he will be entitled to recover $20,720 less the deductions to which he testified, viz: $5,492, and what he would have been obliged to pay sub-agents in the other parts of New England. . . .

"If the company had not terminated Randall's agency contract when it did and had allowed it to continue until February 1, 1903,

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there was nothing in the evidence to show me that he would have made complete specifications for the remaining twenty-four cars before February 1, 1903, and that he would have been able to make payment of ten per cent of the cost of these twenty-four cars on that date."

There then followed in the report a detailed statement of what damages should be awarded "if the rule claimed by Randall is correct," that amount being $14,108; and the statement, "If, however, as claimed by the Peerless Company the damages are speculative and conjectural . . . the plaintiff shall recover only nominal damages."

The last material paragraph of the report was as follows: "The phase of the case that to me seems most important, namely that within a few days of February 1, 1903 when Randall would have been obliged under the contract to furnish specifications for twenty-four cars to be manufactured by the Peerless Company and to pay $6,720 when he had not sold any and did not show that he had the means or resources to make this payment, has not been discussed by counsel or authorities submitted as to liability under these circumstances. I am reluctant therefore to go with counsel for Randall to the extent of damages claimed by him and, taking into consideration that Randall would probably have failed on February 1, 1903 to meet the above requirements, that the Peerless Company acted to protect itself rather than to injure Randall and in carrying on its business incurred large expenses, I find and report that Randall is entitled to recover, $4,000."

Both parties moved that the report be recommitted to the auditor.

The plaintiff's motion was supported by an affidavit from which it appeared that the auditor had excluded evidence offered by both parties relating to the financial standing of Randall and his ability to make the payments to the defendant on February 1, 1903, which the contract called for. The plaintiff's motion in substance asked that the auditor be instructed to "find specially one way or the other the facts set out" in requests for special findings filed with him by the plaintiff; that those paragraphs of the report, above quoted, which dealt with the question whether Randall would be able to make the payments and file the specification called for by the contract on February 1, 1903, be stricken out; and that

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the auditor be instructed to adopt different rules of law for the computation of damages than those which he had adopted.

The defendant's motion for recommittal of the report asked that so much of the report as set out Randall's contentions as to the proper basis for the computation of his damages should be stricken from the report; that the auditor be instructed to find specifically as to certain facts in issue, and either to find that Randall was entitled to nominal damages only or to report fully "the facts found by him as the basis for his finding of damages of $4,000 in favor of Randall."

The motions were heard by *Loring*, J., and thereafter a paper, entitled an "order" on the plaintiff's motion to recommit the report, was filed, which, in a paragraph numbered 1, stated that the findings of the auditor that "on January 21 the Peerless Company without right terminated Randall's agency," and that "During the remainder of the year 1902 and until the New York automobile show in January 1903 Randall went ahead under this agency contract," with what followed in the report "must be taken to be a finding that up to January 21, 1903, Randall had performed all things which he was called upon by the contract to perform up to that date." The paragraph continued: "On the day on which his agency was terminated without right, Randall had by the terms of the contract ten days in which to complete specifications for the remaining twenty-four cars and to make payment of ten per cent of the cost of the cars;" and stated, as to the paragraph in the report, above quoted, which contained the statement, "On January 21, 1903, Randall did not have sufficient funds of his own with which he could pay to the Peerless Company on February 1 the deposit required under his agreement. . . . Neither did Randall show that he was then ready with any of the specifications for the remaining twenty-four cars which he was to furnish to the company before February 1, 1903," that such "would seem to be a finding on an issue which ceased to be an issue in this case when the auditor found that the agency was terminated without right on January 21, 1903."

As to the finding in the report, "If the company had not terminated Randall's agency contract when it did and had allowed it to continue until February 1, 1903 there was nothing in the evidence to show me that he would have made complete specifications for

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the remaining twenty-four cars before February 1, 1903 and that he would have been able to make payment of ten per cent of the cost of these twenty-four cars on that date," the "order" stated in a paragraph numbered 2: "No reason is stated in the report why the ordinary rule does not apply, to wit, that a total repudiation of a contract by the defendant excuses the plaintiff from thereafter performing what but for that repudiation he would have been bound thereafter to perform to entitle him to hold the defendant under the contract. This finding seems to be a finding on an issue which under the finding made by the master never became an issue in the case."

As to the finding in the last paragraph quoted from the report on page 364, *supra*, the "order" in a paragraph numbered 3 called attention to the fact that evidence on the question, whether Randall would be able on February 1, 1903, to pay the money and furnish the specification called for by the contract, was excluded, and states, "It does not seem to be proper to insert in an auditor's report a finding that there 'was nothing in the evidence' upon an issue of fact named when the auditor has excluded evidence on that point, and then to find that that issue is 'the phase of the case that to me [the auditor] seems most important.'"

As to the last sentence in the paragraph of the report just referred to, the "order" in a paragraph numbered 4 stated: "The defendant had no right to terminate the plaintiff's agency on January 21, 1903, because it was probable that Randall would fail to do what he had to do on February 1, 1903. The motive which the Peerless Company had in terminating without right the plaintiff's agency is of no consequence. If that company determined to break its contract with the plaintiff to protect itself, it must pay the damages which were thereby caused the plaintiff; and the damages caused the plaintiff by the termination of his agency without right on January 21, 1903, are the same whatever the defendant's motive was in committing that breach."

As to the requests in the motions of both parties for instructions to the auditor to make findings upon specific issues, the "order" stated: "The auditor is bound to find the facts put in issue by the pleadings which under the findings made by him are material. He is not bound to make specific findings one way or the other on subsidiary facts which bear on the facts put in issue by the plead-

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ings. Neither is the auditor bound to make specific findings when his general finding covers the issue raised by the pleadings which under his findings are material."

On the question of damages, the "order" stated: "The time has not come for the court to lay down the rule of law as to the damages which the plaintiff is entitled to recover, if he is entitled to recover. It may be proper, however, to point out that there is this difference between the plaintiff in the case at bar and the plaintiff in *Garfield* v. *Peerless Motor Car Co.* 189 Mass. 395. The plaintiff in the case at bar was not in fact complying with his part of the contract when the cars sold by the defendant were sold by it, and the plaintiff in *Garfield* v. *Peerless Motor Car Co.* was."

The order made was: "The report is re-committed to the auditor to consider further the first four matters mentioned above. The auditor may consider further any other matters which he thinks ought to be further considered in connection with these matters or not in connection with them. The new report is to be filed in thirty days."

The defendant's motion was denied for reasons stated in the above order on the plaintiff's motion.

The defendant alleged exceptions to the allowance of the plaintiff's motion, to the denial of the defendant's motion, "and particularly . . . to the rulings in the first four paragraphs of the . . . memorandum."

The auditor then filed a substitute report, which was the same as the report previously filed except that it omitted the paragraphs commented on in the "order" on the plaintiff's motion to recommit the previous report, and, instead of the last paragraph quoted from the previous report, contained the finding, "I find and report that Randall is entitled to recover, $4,000."

The defendant moved "that the case may be referred back to the auditor, or that the rule to the auditor may be vacated and the substitute report of the auditor struck from the record," stating as grounds for the motion in substance that the auditor had failed to report certain facts, because he had set out Randall's "claims," because he had stated the defendant's "claims" without stating that those "claims were facts," because as matter of law on the facts reported only nominal damages should have been assessed,

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and "because generally said report is inadequate, ambiguous, indefinite, and misleading."

The motion was heard by *Sheldon, J.*, and was denied; and the defendant alleged an exception.

The case was sent to the Superior Court for trial under St. 1909, c. 33, and was tried in that court before *Morton*, J.

The course of the trial with regard to the photograph of Randall mentioned in the paragraph in the opinion numbered 21, was as follows: In redirect examination one Temple, a witness for the plaintiff, was shown the photograph and testified that it was "a very good picture" of Randall in about 1902 and 1903. The plaintiff's counsel then asked to have it "marked for identification," and, the defendant's counsel objecting, the judge asked, "What is the purpose of it?" and the plaintiff's counsel replied, "When a witness is in court the jury judges as to the truth of his statements not only by what he says but by how he looks. Mr. Randall can't be here, and I offer it in your Honor's discretion to show what kind of a man Mr. Randall was, that's all." Later in the trial the plaintiff's counsel asked one Connell, a witness for the plaintiff, after a series of questions relating to Randall's ability as a salesman, "Can you give any of his personal characteristics, what kind of a looking man he was?" and, the defendant's counsel objecting, the judge stated, "I will exclude that for the present. I passed finally upon the admission of the picture. The jury has what kind of a looking man he was before them." A later witness for the plaintiff, one Cubberly, having further identified the photograph, the plaintiff's counsel offered it in evidence and the judge inquired of the defendant's counsel if he had any objection. The defendant's counsel replied: "Yes, if the rule of damages is to be as your Honor indicated." The judge then stated: "Well, you may have your exception because I should have to admit it under my rule, I should think." The defendant's counsel then said, "I thought you would have to reject it under your ruling," and the judge ruled, "Well, I admit it."

Other facts are stated in the opinion.

The judge submitted to the jury special questions, which, with the answers returned by the jury, were as follows:

"1. Did the defendant at the New York show prior to the talk between Kittredge and Randall on January 21, 1903, notify some

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residents of New England that Randall was not or would no longer be the defendant's New England agent?" Answer: "Yes."

"2. Did the words and conduct of Kittredge at his interview with Randall at the New York Show on January 21, 1903, amount to an absolute repudiation of the defendant's obligations under the contract now sued upon?" Answer: "No."

"3. Was the demonstrating car furnished by the defendant to Randall in November, 1902, such a car as was then contemplated by the parties?" Answer: "No."

"4. Were the three cars referred to in the talk between Kittredge and Randall on or about November 17, 1902, and in Randall's letter of November 22, 1902, part of the 25 mentioned in the contract of June 7, 1902, or in addition thereto?" Answer: "Additional."

"5. Did Randall at his interview with Kittredge on January 21, 1903, consent to a rescission of the contract now sued upon?" Answer: "No."

"6. What sum, if any, does the jury find as damages on the plaintiff's claim entitled 'Second' in the second count of the declaration as amended for loss or profits on repair work and sales of parts during the year 1903?" Answer: "$1,500."

The jury found for the plaintiff in the sum of $14,889.20.

The subsequent proceedings at the trial and other exceptions by the defendant are described in the opinion.

G. W. Anderson, (*R. L. Ryder* with him,) for the defendant.

W. G. Thompson, (*R. Dow & G. E. Mears* with him,) for the plaintiff.

RUGG, C. J. This is an action at law pending in the Supreme Judicial Court for Suffolk County. The plaintiff's intestate, who for convenience will be referred to hereafter as the plaintiff or Randall, entered into a contract in writing with the defendant by which he agreed to become its New England agent for the term of one year from January 1, 1903, and to order twenty-five automobiles of it, furnishing specifications and advance partial payments on or before February 1, 1903, to be delivered between February 1 and July 1. The prices were specified by reference to the list of the defendant. The times of payment were fixed. He further agreed to maintain suitable sales rooms and repair

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shop in Boston, to carry in stock for exhibition and demonstration one or more "new motor cars manufactured by" the defendant and reasonable supplies, to devote his "best energies" to the sale of the defendant's product, and to canvass his territory, and to receive promptly cars ordered, and to do local advertising. The order for twenty-five automobiles was given contemporaneously with the making of the contract.

The defendant agreed to make Randall its "exclusive agent" for New England for the term of one year from January 1, 1903, to furnish him its advertising matter, and to give him certain discounts from list prices on supplies and cars. It was further agreed that if Randall failed to secure "sales of the product of [the defendant] commensurate with the sales of other cars within" New England the defendant might terminate the contract on thirty days' notice in writing to the plaintiff, and that the contract might be terminated by the defendant on thirty days' written notice to the plaintiff.

Three bills of exceptions are here, and a fourth bill of exceptions disallowed by the Superior Court judge, is before us on report of a commissioner.

1. The case was referred to an auditor. Upon the coming in of his report each party filed a motion to recommit the report. The first bill of exceptions relates to these proceedings. The plaintiff's motion was granted, and the defendant's denied, but the case was recommitted to the auditor with directions to the auditor to consider four defined matters and "any other matters which he thinks ought to be further considered." This was a compliance in substance with the chief thing which each party requested, viz., a recommittal of the report. It is doubtful whether the main part of the order, to which the defendant excepted, was anything more than a memorandum (as it is described in the record) and hence not a subject for exception in an action at law. *Attorney General* v. *Oliver*, 175 Mass. 163. *Abbott* v. *Walker*, 204 Mass. 71. *Regal* v. *Lyon, ante*, 230. Moreover, the statements contained in it do not appear to be rulings, but indications of the reasons which moved the single justice in the exercise of his discretion, to which no exception would lie. But treating it as subject to exception, no error is shown. A motion to recommit an auditor's report ordinarily is addressed to the discretion of the court, the exercise of which is not reviewable.

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The discussion in the report of the ability of the plaintiff to perform his part of the contract on February 1 was wrong in view of the auditor's refusals, which appeared upon the face of the affidavit accompanying the plaintiff's motion, to admit evidence touching his financial standing. This appeared to be in the nature of a finding after refusal to hear evidence. If, as the auditor found, "on January 21 the Peerless Company without right terminated Randall's agency," it followed that Randall's finances were of no consequence on the issue of breach of contract. The entire subject of damages was left open by the express statement of the single justice that the time had not yet come for the court to lay down the rule of damages. The auditor was at liberty to adopt such rule of damages in view of all the evidence as seemed to him wise upon further consideration. This involved the question whether Randall would have been able to carry out his part of the contract when the time arrived for him to act, if he thought it material. The record is not fairly susceptible of the meaning that the single justice then laid down as the law of the case that the plaintiff was entitled to recover as full damages as if he had been permitted to complete the contract, no matter whether he would have been able to perform but for the breach by the defendant. That would have been laying down, in part at least, the rule of damages. But the single justice unmistakably said that the time had not come for that, and the case was sent back to the auditor with the fullest authority to reconsider the whole of it in all aspects. The law is plainly as was pointed out in *Beach & Clarridge Co.* v. *American Steam Gauge & Valve Manuf. Co.* 208 Mass. 121, 129, 132, that the plaintiff could recover full damages only when the evidence showed his ability to perform his part of the contract. No anticipatory breach of the contract appears to be involved in this bill of exceptions. If the defendant refused on any date to permit Randall longer to act as its agent in soliciting orders, that was a present breach. Plainly the rulings to the effect that the time had not arrived for the court to lay down a rule of damages and that the auditor was not required to make findings of subsidiary facts or a detailed statement of all the contentions of parties were not incorrect as matter of law.

2. No question of law is presented upon the defendant's motion to recommit the substitute report, which is the subject of the second

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bill of exceptions. It was addressed wholly to the discretion of the single justice. If any errors were referred to in the motion to recommit, they were of such nature that they could have been corrected at the trial. *Tobin* v. *Kells*, 207 Mass. 304. *Greene* v. *Corey*, 210 Mass. 536, 546. *Hunneman* v. *Phelps*, 199 Mass. 15. *Chelmsford Foundry Co.* v. *Shepard*, 206 Mass. 102.

3. The case was sent to the Superior Court for trial by a jury. The third or main bill of exceptions relates to this trial. Exceptions touching performance by the plaintiff of his part of the contract will be considered first. A general ruling in favor of the defendant or for the plaintiff for only nominal damages could not have been given. The auditor's report, admitted in evidence without objection, was a finding for the plaintiff for substantial damages. The plaintiff had a right to go to the jury upon the *prima facie* case which it presented. The auditor's report was an unequivocal finding of facts upon evidence, and in no sense a ruling of law upon facts stated. It was entitled to the probative force arising from its inherent value, whatever that may have been, in connection with all the other evidence. *Fisher* v. *Doe*, 204 Mass. 34, 39, 40.

4. The defendant contends that Randall failed to perform his contract, in that he did not give specifications and deposits for three cars before January 1, 1903. This contention arises not out of the original written contract, but out of a subsequent transaction. The plaintiff ordered and received a demonstrating car on terms of payment different from those stipulated in the original agreement, with the understanding that he should order three cars before January 1. A special question was submitted to the jury, by which they found that these cars were in addition to the twenty-five ordered as a part of the main contract. It was found in answer to a further question that the demonstrating car furnished by the defendant was not such as was contemplated by the parties. These special findings make it plain that the arrangement respecting the three cars was collateral and subsidiary, failure to perform which would not go to the essence of the main contract or justify the defendant in repudiating it. It is unnecessary to consider the correctness of the charge upon the theory that they were a part of the twenty-five cars ordered earlier.

5. The contract required the plaintiff "to devote his best

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energies to the sale of the product" of the defendant. The meaning of these words must be determined in the light of the other terms of the contract, of the circumstances of the parties when the contract was made, and of their conduct during the period when indisputably the contract remained in force. It is obvious that "best energies" is not used in the sense of exclusive attention. The word "exclusive" occurs in the contract in describing the kind of agent Randall became under the contract. The employment of a non-synonymous word here tends to show a different purpose. Another clause of the contract required him to maintain an efficient repair shop for cars of the defendant's make, not alone for those sold by him, but for all cars, and this business was to be conducted as a venture wholly at his risk. This in itself might require a part of his energy for its success. Moreover, it was known to both parties that Randall was carrying on the business of selling and repairing bicycles and motor cycles before the execution of this contract, for which he maintained a store and repair shop. It is not contended that this business was not to be continued. It is plain, too, that the parties did not intend that sales should be made only through Randall personally, because there was correspondence as to his representatives in other cities of New England, through whom he might conduct in part the business contemplated by the contract. It might have been inferred that the fact that Randall had and proposed to continue an established business of this general character, which it was anticipated he might enlarge, was one of the motives of the defendant in entering into the contract, and that the value of the arrangement depended in part upon the extent of Randall's acquaintance with the public interested in machines of this sort, and the nature of his reputation as being able to supply vehicles adapted to the desires or needs of all or a large proportion of prospective purchasers. This might be enhanced appreciably by his representing a line of non-competing automobiles as nearly complete as the state of the trade then permitted. The plaintiff was left under the terms of his contract, so far as concerned the selling of cars, to conduct his business in his own way. The means and methods to be adopted were his, and not those of the defendant. He was not subject to the supervision and control of the defendant in any respect, so long as he complied with the terms of the contract. *Conners* v. *Hennessey*, 112 Mass.

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96. *Morgan* v. *Smith*, 159 Mass. 570, 574. *Sullivan* v. *New Bedford Gas & Edison Light Co.* 190 Mass. 288. *Eldred* v. *Mackie*, 178 Mass. 1. Under these and other conditions, which might have been found on the evidence, it is apparent that "best energies" meant such effort as in the exercise of sound judgment would be likely to produce the most profitable results to the defendant in view of the nature of the business and the extent of territory over which it was to be conducted. The relation might have been found to have been analogous to that frequently established between a general retail merchant and the maker of any single and special kind of merchandise. As bearing upon the question whether the plaintiff did devote his best energies to the sale of the Peerless car evidence was introduced to the effect that a few days before the alleged repudiation of the contract by the defendant the plaintiff entered into an agreement to act as agent for the sale of the Stevens-Duryea car for 1903. If this was not a car which would compete, in any fair sense in the minds of prospective purchasers, with the car manufactured by the defendant, then he was not precluded from undertaking its sale. He had a right to enlarge his business in the same general line. As to this point the instruction was given, "If the Stevens-Duryea car was not a competing car, whatever he [Randall] did in regard to it is of course immaterial. Was it such a car in size, horse-power, capacity for carrying passengers, its costs and in such other details as the jury think enters fairly into the question? Was it a car of such a sort that a prospective purchaser would have no other basis upon which to decide whether or not to buy except the efforts of the agent to sell?" The last sentence standing alone is not an accurate statement of the law. Competing cars are those so similar in cost, design, size, power, carrying capacity and other characteristics as fairly may leave ordinary and reasonable customers in such doubt in making a choice between them as to permit the skill of a salesman to become a determining factor. There was hesitation in the mind of the judge of the Superior Court as to the right of the defendant to an exception upon this point, for when it was saved he remarked to the defendant's counsel, "I several times used that very language to you and you did not object to it; I understood that both counsel approved that language." To this statement no objection was made. So far as the printed record goes, while the evidence

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is not conclusive, its weight seems to be that the cars of these two makes on the market in 1903 were not competitors in any reasonable sense. The language used in the charge touching the subject taken as a whole in the light of all these circumstances is such that if it stood alone we should hesitate to hold it so clearly not susceptible of the correct meaning as to have been likely to mislead the jury or to require a new trial.

6. But the further instruction was given that the mere making of the agreement by the plaintiff on January 17 to act as agent for the Stevens-Duryea car (if found to be a competing car) would not be such a violation of his contract as to warrant rescission by the defendant on January 21 unless he did something in the meantime to interfere with the devotion of his best energies to the interests of the defendant. To determine the correctness of this ruling involves some analysis of the contract. It was in one respect merely a contract for purchase and sale of automobiles. As has been pointed out in discussing the "best energies" clause, the plaintiff was not strictly an employee of the defendant, but an independent dealer. In other respects it created the relation of principal and agent. The words, "agent" and "agency," occur several times in the contract. In a broad sense these words were used accurately in view of what both parties contemplated. The plaintiff had no right to undertake any obligation inconsistent with his duty to the defendant vigorously and intelligently to push the sale of the defendant's product in New England. All sales of those products were to be made by the terms of the contract exclusively by the plaintiff in the territory described. There is no inconsistency in the establishment of this double relation of an agreement for sales and for agency. They may coexist and impose binding duties if this is the intention of the parties. That is what this contract did in express terms. In this regard the case is similar to *John Hetherington & Sons* v. *William Firth Co.* 210 Mass. 8, 22, 25. It is firmly established that the agent is bound to exercise at all times the utmost good faith toward his principal. This is not a "technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality." *Parker* v. *McKenna*, L. R. 10 Ch. 96, 118. Agents are not permitted to put themselves in a position antagonistic to the interests of those whom they represent. They cannot serve two masters. It is not a question

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whether in fact the principal has suffered actual injury. The policy of the law is contravened by the creation of the temptation for wrongdoing by entering into the adverse relation, and it is not necessary to go to the extent of showing that the opportunity was embraced. The mere act of signing a contract of agency which created legal obligations inconsistent with those assumed under the pre-existing contract with the defendant was an act which by itself alone justified the termination of the contract by the defendant. *Little* v. *Phipps*, 208 Mass. 331, 333. *Quinn* v. *Burton*, 195 Mass. 277. *Erskine, Oxenford & Co.* v. *Sachs*, [1901] 2 K. B. 504. *Cotton* v. *Rand*, 93 Texas, 7, 23. Nor was it necessary that the defendant should have known of the making of the antagonistic contract with the competing company when it is said to have terminated the contract involved in this action on January 21. Nevertheless, it may serve as a sound ground for termination of the contract, if it be found to have existed. The defendant no longer was bound to continue an agency agreement with one so unmindful of his duty in that regard as to enter into an adversary contract, even though he had not commenced its performance. *Boston Deep Sea Fishing & Ice Co.* v. *Ansell*, 39 Ch. D. 339, 357. The defendant excepted to this paragraph of the charge expressly. It was erroneous in law. As it is conceivable that the jury may have believed the evidence to the effect that the Stevens-Duryea car was a competitor of the Peerless in 1903, it cannot be said that this erroneous instruction was not prejudicial to the defendant. It may have been decisive in causing the jury to reach the general finding in favor of the plaintiff.

7. The plaintiff did not answer promptly certain letters written him by the defendant. They were the natural letters of inquiry as to prospects of business, and what the plaintiff was himself doing and urging activity. It requires no discussion to show that under the circumstances here disclosed such failure did not go to the substance of the contract or warrant recission by the defendant. It was one circumstance to be considered with all others in deciding the issue.

8. The defendant argues with great strenuousness that there was no evidence of a breach of contract by the defendant. But it was found by the auditor that on January 21, 1903, the defendant "without right terminated" the contract. This finding, if unre-

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butted or unexplained, was evidence sufficient to maintain the burden of proof resting upon the plaintiff in this respect, and would warrant a finding that the defendant committed a breach of the contract without legal justification. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527, 536. But considered apart from this there was evidence for the consideration of the jury. The testimony as a whole, together with the conduct of the defendant in taking steps to establish a Boston agency in its own name would support an inference that the interview between Randall and Kittredge on January 21 amounted to a withdrawal by the defendant of the plaintiff's authority longer to act as its agent in Boston. If this was found, it was a present violation of the plaintiff's right to solicit orders, and did not require him to wait to see whether specifications for a particular car or cars sent by him would be rejected. Every passing day was a time for performance on his part. Although he was not compelled to send any description and order for a car until February 1, he had a right to do so at any time after January 1. Refusal to recognize the continued authority of Randall under the agency to solicit orders from the public was an instant breach. No question of anticipatory breach was involved, if this interpretation was given to the narration of what was said and done on or about January 21. As has been pointed out, the contract had a double aspect — one of sales of automobiles, and the other of agency. They were so bound together that each was essential, and breach of either was a breach of the whole contract.

9. The defendant contended that it was justified in terminating the contract, on the ground that the plaintiff had failed to secure sales of its product "commensurate with the sales of other cars within said territory," and excepted to the instructions upon this point. But the charge in this respect was ample and accurate. The test established impliedly by the contract and stated expressly in the charge was whether the plaintiff sold as many cars of the defendant's make to the general public in the time he worked under the contract as were sold by other competing dealers in the same time, comparing with the "Peerless 1908 car with its merits and demerits, the car or cars whose sales are relied on with their merits and demerits." If there had been only one competing car, comparison would be with the sales of that car; if several, with the

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sales of each. There was evidence that more than one other make of car was a competitor with the Peerless during 1903.

10. Many requests for rulings were presented by the defendant as to rescission and repudiation and waiver of the thirty days notice in writing required by the contract for its termination by the defendant. Most of them related to fragmentary aspects of the evidence and to conflicting claims of the parties. It is not necessary to review them in detail. The charge laid down in brief general propositions of law upon the subject which were correct. While they might have been stated with greater amplification, it cannot be said that they were insufficient. Of course all the evidence was open to a very different construction from that put upon it by the jury. But it could not have been ruled without error in law that it was not susceptible of the inferences drawn by the jury.

11. There was evidence tending to show that persons in the employ of the defendant solicited residents of New England to buy cars directly of it, and not through Randall, at the New York automobile show in January, 1903, and stated that he was no longer the defendant's New England agent. This evidence was admitted rightly. One of these persons was identified as Morrison, a sales agent of the defendant, and later in charge of the Boston agency of the defendant. Others were said to be about the Peerless booth at the show waiting on customers. This was a sufficiently close identification to render the evidence competent. *Norris* v. *Anthony*, 193 Mass. 225. *Bagley* v. *Wonderland Co.* 205 Mass. 238, 245. Statements of this sort perhaps to those who visited the booth through an invitation from Randall might have been found to have been made in the course of the defendant's business, apparently in the performance of the employee's duty to the defendant and within the scope of its authority. For conduct and statements of such agents the defendant might have been found responsible. *Bigelow Carpet Co.* v. *Wiggin*, 209 Mass. 542, 549. These were not necessarily idle rumors or prophesies. They might have been found to be inducements held out at the defendant's place of business by those in charge of it to procure sales for the benefit of the defendant in violation of its agreement with the plaintiff. If found to be authorized, they were a breach of such an essential part of the contract as would excuse performance by the plaintiff. The plaintiff was entitled to the agency in New England, exclusive

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not only of other agents but of the defendant. *Garfield* v. *Peerless Motor Car Co.* 189 Mass. 395, 403. It would have been a violation of a vital part of the contract for the defendant to represent to New England customers that the plaintiff was not its agent, and that purchases could be made directly from it. The evidence was admitted rightly. There was, however, further evidence to the effect that there was a custom for other agents to sell at the show in New England territory crediting such sales on the account of the agent for that territory. If this custom was found to exist and to have been assented to by the plaintiff, it perhaps might have been treated as a subsequent modification of the contract. But treating the custom as admissible under *Garfield* v. *Peerless Motor Car Co.* 189 Mass. 395, 402, it was sufficiently favorable to the defendant to leave the weight of this evidence to the jury, and to charge that in the absence of custom, such sales and other conduct, if by authorized agents of the defendant, would constitute a violation of the defendant's obligation.

12. No objection was urged at the trial against the evidence as to breach of the contract by the defendant in attempting to make sales and in making representations in derogation of the plaintiff's agency or the charge touching it on the ground that the subject was not open under the pleadings. It is too late to raise that question now. *Ridenour* v. *H. C. Dexter Chair Co.* 209 Mass. 70.

13. The supplemental requests for rulings presented by the defendant at the conclusion of the arguments were refused rightly under Superior Court common law rule 45, no special leave having been granted to file them at a time later than required by the rule. *Quimby* v. *Jay*, 196 Mass. 584.

14. The trial judge ruled correctly that the reference in the auditor's report to the claims of profits of the plaintiff and to the claim of expenses incurred by the defendant in conducting its business for 1903 were mere statements of conflicting contentions and not findings. They were not inappropriately included as showing the limits of a wide variation in evidence, and as indicating that his finding was not the result of complete credence of that of either side.

15. The defendant earnestly argues that the plaintiff was not entitled to recover anything more than nominal damages. The

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rule touching the loss of prospective profits as an element of damages for breach of contract frequently has been stated in recent cases. Such loss may be recovered when it appears to have been within the contemplation of the parties as a probable result of breach of the contract, to be its natural, primary and probable consequence, and to be susceptible of proof by evidence reasonably certain, and not resting chiefly on speculation, conjecture or surmise. It is not necessary that damages in order to be recoverable shall be calculable with mathematical accuracy. There may be elements which can be determined only by approximation, and which may be in some degree contingent or matter of opinion; and yet the damages as a whole may be measured by a standard as definite as that by which in the nature of things courts and juries must be guided in reaching results in many instances. *Gagnon* v. *Sperry & Hutchinson Co.* 206 Mass. 547. *Hanson & Parker* v. *Wittenberg,* 205 Mass. 368. *John Hetherington & Sons* v. *William Firth Co.* 210 Mass. 8, 21. *Maynard* v. *Royal Worcester Corset Co.* 200 Mass. 1, 8. *Dennis* v. *Maxfield,* 10 Allen, 138. Loss of profit may have been found to have been within the contemplation of the parties as the result of a breach. The margin of gross profit was fixed definitely by the contract at a percentage on the list price of the defendant. The contract required a minimum order of cars of a stated price from the plaintiff. In those respects, the contract differs widely from that under consideration in *John Hetherington & Sons* v. *William Firth Co.* 210 Mass. 8; *S. C. ante,* 257.

While the obligation of the defendant to deliver was not equally specific, it must be assumed to have been made in the prosecution of a fair business by the defendant, and not as a snare or trick. Hence, the intention of the parties might have been inferred to be that deliveries should be made at such times and in such numbers as would enable the establishment of a reputation of reasonable promptness on the part of the defendant. Such an inference was in favor of the good faith and business capacity of the defendant. Loss of profit may have been inferred to be likely to flow as a reasonable and probable consequence of the failure to perform by the defendant. Deprivation of a specific sum of money for the sale of each car would cause naturally a net financial detriment to the plaintiff. The evidence was such as not to leave the jury wholly without guide as to the extent of the plaintiff's

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loss. The business of selling automobiles, although new, was not absolutely uncertain. The plaintiff had sold four Peerless cars during 1902 and other motor vehicles from his store on Columbus Avenue. There was sufficient stability and public interest in the subject to warrant the holding of one exhibition in New York before the making of the contract, and another in January, 1903. There was a considerable body of evidence as to manufacturers of other cars maintaining agencies or sales-rooms in Boston, and as to the number of cars sold by one or more of them. There was evidence also that Randall was intimately acquainted with this branch of trade, was himself an expert mechanic, and had a large number of subagents working or ready to work in soliciting orders for him in various parts of his territory. The Peerless car had acquired already reputation as a representative car. The number of cars actually sold by the defendant during 1903 and those of other makes sold by the plaintiff and others had some tendency to show the extent of the demand for mechanically driven vehicles. This and other evidence might have been found to furnish knowledge extensive enough to be a basis for a direct inference as to the number of cars the plaintiff might have sold but for the wrongful act of the defendant. The evidence as to the expenses of conducting the plaintiff's business was sufficiently definite to enable a just estimate to be made of the deductions necessary in order to ascertain the net profit which might have come to the plaintiff. Upon all the circumstances it cannot be said rightly that the damages were not capable of ascertainment by reference to a sufficient number of reliable facts covering a reasonable field of information. Proof of the nature and extent of the plaintiff's loss, which might have been treated as trustworthy, was afforded by the evidence. *Johnston* v. *Faxon*, 172 Mass. 466. *Loughery* v. *Huxford*, 206 Mass. 324. *Magnolia Metal Co.* v. *Gale*, 189 Mass. 124. *Edgar* v. *Breck & Sons Corp.* 172 Mass. 581. *Emmons* v. *Alvord*, 177 Mass. 466, 471. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 199 Mass. 220. *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 211 Mass. 132. *Chaplin* v. *Hicks*, [1911] 2 K. B. 786. *Blair* v. *Laflin*, 127 Mass. 518. *Speirs* v. *Union Drop Forge Co.* 180 Mass. 87. There is no inconsistency between the principle established by these cases and the equally well settled rule that injury or damage to real estate does not

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permit an inquiry into business conducted on the real estate. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 537. The two subjects are distinct and separable. The contention of the defendant cannot be sustained to the effect that there should have been deducted from the plaintiff's net loss the profits made by him in the sale of the Stevens-Duryea car. If his agency for that car was not a breach of his contract with the defendant, then he had a right to sell Stevens-Duryea cars as a part of his general business, of which the defendant could not complain, so long as otherwise the contract was performed. As has been pointed out, the contract did not entitle the defendant to the entire time or exclusive attention of the plaintiff.

16. The defendant has argued that the plaintiff was not entitled to recover substantial damages without showing that he would have been able to carry out his contract on February 1st by depositing with the defendant the money which would then have been due from him. If he was in such financial condition that it would have been impossible for him to perform his obligation under the contract and this would have been manifest eleven days after the breach by the defendant, his damages would have been at most nominal or small. *Beach & Clarridge Co.* v. *American Steam Gauge & Valve Manuf. Co.* 208 Mass. 121, 133. This was the substance of the defendant's request for ruling No. 53.* It was not given in form or substance. But it does not follow of necessity that this exception must be sustained. The defendant presented sixty-four different numbered requests for instructions. Counting those arranged as subsidiary and alternative rulings, there were one hundred and one. At the close of the charge, instead of pointing out those which it claimed had not been given, a course demanded by the plaintiff, *Kenny* v. *Ipswich*, 178 Mass. 368, it saved general exceptions to the refusal of the trial judge to grant such as had not been covered in substance by the charge and to the charge upon damages. This course was irregular, and did not give the court or the opposing counsel quite a fair chance in view of the great number and voluminousness of the requests. *Jones* v. *Newton Street Railway*, 186

* The exact wording of this request was as follows:

"53: The burden is upon the plaintiff in order to recover damages to show that Randall was able, and willing to furnish specifications and deposits for the twenty-five cars on or before February 1, 1903."

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Mass. 113. *Commonwealth* v. *Devlin*, 141 Mass. 423. *McKee* v. *Tourtellotte*, 167 Mass. 69. *Fairman* v. *Boston & Albany Railroad*, 169 Mass. 170, 174. *Hayes* v. *Moulton*, 194 Mass. 157, 165. However as the judge made no objection to the extraordinary number of the requests and acting within his authority relieved the defendant of pointing out those thought to have been refused, it may be that we ought not to overrule on this ground alone the exception to the refusal to give this request. But when it is taken in conjunction with the course of the trial, justice does not seem to require a new trial. This branch of the plaintiff's case was definitely in the minds of the parties when the motions to recommit the first report of the auditor were argued. This has been pointed out under paragraph numbered 1 of this opinion. Thereafter it appears to have dropped out of the case as a distinct subject for controverted testimony. No evidence directly touching the financial responsibility of the plaintiff is found in the record, except in connection with the three extra cars not now material. Of course, as a part of the strategy of trial the defendant was not bound to do anything more than bide its time and ask for a ruling that there was no evidence touching a point where the burden rested upon the plaintiff. But having pursued that course and offered no evidence, it cannot complain if the record is construed with some strictness and with reference to all the inferences that might have been drawn under all the circumstances. There was evidence to the effect that the plaintiff had been in business several years and was maintaining two stores, that he had a good reputation in the trade and a wide acquaintance, and that he had said that he wanted to get money from collections of outstanding accounts rather than to borrow to meet his February 1 payment to the defendant. All this might be taken to mean that he was able to borrow or otherwise procure money to meet this obligation, and would do so when the time came rather than break his contract. The record is not without substantial evidence to support a finding in favor of the prevailing party upon the point. Under all these conditions, and especially in view of the multifarious requests for rulings presented by the defendant and the course of the trial, it seems more consonant with the general accomplishment of the ends of justice to require the excepting party to call attention specifically to a request like this at the close of a charge rather than to permit a

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long trial to go for naught by reason of omission to cover a subject touching the reality of which, as a point of controversy at the trial, we are left in doubt upon the record. The defendant fails to satisfy us that the error was a material one under all the circumstances.

17. For the reasons already stated no reversible error is shown in the treatment of the claim of the plaintiff for loss of profits on repairs and discounts on sales of parts set out in his second count.

18. Testimony of a statement made by Randall, not in the presence of the defendant or any of its agents, when he was at the New York show, to the effect that he had been discharged by the defendant, probably was incompetent. *Brown* v. *Brown*, 208 Mass. 290, and cases cited. But no exception was taken until after the question was answered and no motion was made to strike out the evidence. Under these circumstances, the exception must be overruled. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, 99.

19. No error appears in the exclusion of testimony proffered by the defendant from several witnesses as to the number of cars which in their opinion the plaintiff would have sold in 1903. Under some circumstances perhaps evidence of this sort might be admissible. But here there was evidence as to the number of cars of several makes actually sold during 1903 and divers other facts from which an inference could be fairly drawn by the jury. It was a case where expert evidence might well be excluded in the discretion of the trial judge. It does not appear that there was the inconsistency by the judge of admitting the testimony of one and excluding that of another witness to the same point. The evidence of Randall did not go to this point. *Whipple* v. *Rich*, 180 Mass. 477. The accuracy of the reason given for the exclusion of the evidence is of no consequence. It is enough if for any reason the exclusion was not erroneous.

20. The evidence of the witness Brenton of declarations made to him by Randall was admissible as showing the condition of the demonstrator car and the efforts Randall had made to sell cars, under R. L. c. 175, § 66. Declarations are not rendered inadmissible under this statute, because the deceased has survived the beginning of the action and testified at one trial. Here Randall had testified before an auditor, and his evidence taken stenographically was read as evidence at the trial in the Superior Court. The statute makes no such distinction, but provides in unrestricted

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words that declarations of a deceased person made before action brought shall not be inadmissible because hearsay. The statute has always been liberally construed. *White* v. *Boston Elevated Railway*, 208 Mass. 193. *Marston* v. *Reynolds*, 211 Mass. 590. It must be assumed that the preliminary finding of good faith and personal knowledge was made. The declarations were such that Randall, if called as a witness, might have testified to their substance. It does not appear that the declarations thus shown were touching precisely the same point as that covered by his testimony before the auditor read at this trial. It is not necessary to decide what would be the effect of that fact. There was no request that this evidence be restricted in its effect, and hence if admissible for any purpose the exception must be overruled.

21. The discretion of the trial judge would have been exercised more wisely by the exclusion of the photograph of Randall under the circumstances here disclosed. But it is not such an error as warrants a new trial. Such a decision will not be revised unless plainly wrong. *Field* v. *Gowdy*, 199 Mass. 568, 574.

22. Evidence from various witnesses as to the condition of the demonstrator car and the trouble Randall had in making it run was competent upon the issue whether the demonstrator car conformed to the supplemental contract for the purchase of these additional cars. Being competent upon this issue, a general exception to its admission must be overruled. *Produce Exchange Trust. Co.* v. *Bieberbach*, 176 Mass. 577, 581.

23. No reversible error appears in connection with the reading of a stenographic transcript of the testimony given by Randall at an earlier trial. This was admissible under the common law practice permitting an accurate reproduction of the testimony of a deceased witness given at a former trial between the same parties or their privies. *McGivern* v. *Steele*, 197 Mass. 164. *Jaquith* v. *Morrill*, 204 Mass. 181, 189. The transcript appears to have been very long and to have included many questions and answers thought by one or the other counsel not to be strictly material. It was suggested by the judge that each counsel select such portions as he desired to read to the jury. Both not acceding to this, he permitted the plaintiff's counsel to read what he desired and then the counsel for the defendant read all he cared to read without waiving his special objections or objection to permitting the plaintiff to read

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only a part of it. While such evidence must be presented with substantial accuracy, it was quite proper for the trial judge to endeavor to shorten the reading of a mass of questions and answers which apparently did not seem to him to be helpful to the jury. The rights of the defendant were preserved by permitting him to read such parts as he desired, the whole being presented for his use. In essence, it was exercising simply judicial power as to the order of proof.

24. A very large number of exceptions were taken to the admissions and exclusion of evidence. Most of those argued by the defendant have been discussed in this opinion. It is stated in the defendant's brief that none are waived. They have all been examined with care. The others do not involve such questions of law as to require notice one by one. No reversible error appears to have been committed either because the rulings were made in the exercise of judicial discretion or because an incorrect ruling was withdrawn or corrected subsequently, or because relating to immaterial matters, or because cured by the answers of the jury, or for some other reason not requiring a sustaining of exceptions.

25. The second question submitted to the jury was in substance whether the defendant repudiated the contract at New York on January 21, 1903, to which the answer was "No." The plaintiff filed a motion to set aside this answer on the ground, among others, "that said answer is not the answer the jury intended to give to said question, but was based upon mistake, the nature of which will be disclosed by affidavits to be filed herewith." The several affidavits of eleven jurors were presented, which after setting forth his intention to have answered the question that the defendant through its manager on the date referred to declared an intention not thereafter to be bound by the contract concluded with the words, "the writing of the word 'No' in answer to the question was a mistake, and does not express the intention or opinion of the jury." The affidavit of the foreman was the same, except that he added the words, "I put to the jury this question, viz.: 'Gentlemen, is it your mind that this question should be answered favorable to the plaintiff,' and they all said 'Yes.'" This supplemental statement of the foreman was not competent under the rule of *Woodward* v. *Leavitt*, 107 Mass. 453, 460; *Commonwealth* v. *Meserve*, 156 Mass. 61; *Simmons* v. *Fish*, 210 Mass. 563, 571, and many other cases

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to the effect that the proceedings within the jury room cannot be made the subject of inquiry. But no special objection was made to this part of his affidavit. It is separable from the part of his affidavit which was admissible. The competent and the incompetent are not so interwoven that they must stand or fall together, and at this stage of the proceedings under these circumstances justice does not require a new trial because of an error which, if specially pointed out at the time, might have been corrected easily. The general rule is that the policy of the law guards so strictly the secrecy of the deliberations of the jury that their conduct, motives or grounds of action in the jury room are sealed from subsequent investigation by examination of the jurors. But this falls short of excluding testimony or affidavits of all the members of the panel to the effect that a mistake has been made in the formal expression of the determination actually reached. Instant correction of manifest errors, either under the eye of the court or by sending out the jury for that purpose, is not infrequent. *Burke* v. *Hodge*, 211 Mass. 156, and cases cited at 163. The fair import of the affidavits presented is, not that the jury misunderstood the court's instructions or failed to apprehend the meaning of "repudiation" as applied to this contract, but that by reason of a clerical error there was a failure to express with accuracy in writing the conclusion to which all deliberately had given adherence. This is within the rule of practice established by *Capen* v. *Stoughton*, 16 Gray, 364, and consistently followed since. *Karrick* v. *Wetmore*, 210 Mass. 578, 579. The affidavits of all the jurors agreeing to the same point were admissible for the purpose of showing the clerical error occurring after the deliberations of the jury had ceased and the verdict had been agreed upon, and of enabling the court to correct it. A clerical error in the statement of the conclusions of a jury established by uncontroverted evidence may be corrected. It is true that the present case goes slightly beyond the facts in *Capen* v. *Stoughton*, 16 Gray, 364, but not beyond its principle. The verdict there in question was that of a sheriff's jury returned into court after the jurors had separated, while in the case at bar the answer was read in open court and affirmed and recorded in the presence of the jurors. But an inconsistency or mistake was obvious upon the face of the several answers and the general verdict. They could not all stand together. This appar-

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ently escaped the attention of the trial judge and of all counsel, for nothing seems to have been said about it at the time. Under such circumstances it is more consonant with justice to receive the unanimous statement of all the jurors, even though made subsequent to their separation, for the purpose of correcting a clerical error in what is otherwise a correct record of a fair trial, than to put the parties and public to the expense of another trial. This course has been followed generally whenever the question has arisen. *Dalrymple* v. *Williams*, 63 N. Y. 361. *Hodgkins* v. *Mead*, 119 N. Y. 166. *Gillespie* v. *Ashford*, 125 Iowa, 729. *Peters* v. *Fogarty*, 26 Vroom, 386. *Hamburg-Bremen Fire Ins. Co.* v. *Pelzer Manuf. Co.* 22 C. C. A. 283; 76 Fed. Rep. 479. *Roberts* v. *Hughes*, 7 M. & W. 399. *Cogan* v. *Ebden*, 1 Burr. 383. *Wolfgram* v. *Schoepke*, 123 Wis. 19. *Jamieson* v. *Harker*, 18 U. C. Q. B. 590. See 4 Wigmore on Evidence, § 2355. There are decisions to the contrary, but they contain no full discussion of the subject. *McKinley* v. *First National Bank*, 118 Ind. 375. *Chevallier* v. *Dyas*, 28 La. Ann. 359. *Smalley* v. *Morris*, 157 Penn. St. 349. *Stevens* v. *Montgomery*, 27 Minn. 108. These cases seem to us to fail to take account of the distinction between the correction of a mistake proved by the unanimous statement of the panel, on one side, and the impeachment of a verdict by testimony respecting conduct and discussion in the jury room or the understanding and apprehension of evidence or law by the several jurors, on the other. The former is permissible. The latter is not. *Hannum* v. *Belchertown*, 19 Pick. 311. *Bridgewater* v. *Plymouth*, 97 Mass. 382. *Woodward* v. *Leavitt*, 107 Mass. 453.

26. A further question is raised as to the action of the judge of the Superior Court upon the motion to set aside the answer to this question. In the main bill of exceptions it appears that when the motion was heard the judge said respecting the affidavits of the jurors "I shall rule that they are admissible, and if admissible, the finding is set aside. . . . The general verdict stands." To both these rulings the defendant duly excepted. A few days later the judge indorsed upon the motion (which set forth several grounds, the fourth being the mistake in the record of the answer) "Motion allowed on the fourth ground if affidavits are legally admissible. Otherwise motion disallowed." Thereafter the judge changed the indorsement by striking out the words "if affidavits are legally

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admissible. Otherwise motion disallowed" as stated in the main bill of exceptions, "so as to make the statement of rulings and findings of the court in accordance with the facts as above indicated." It is apparent from this recital that the substance of the original ruling was that the affidavits were admissible, and that relying upon them the answer was set aside. The indorsement made upon the motion was no ruling at all, failing to express the unequivocal oral ruling earlier made. It was inoperative as an adjudication of the motion. It was the duty of the judge to make a determination of the matter. That duty was performed at the argument by the oral ruling and by the change made in the indorsement which converted the previous ineffectual indorsement into a decision. The plain inference seems to be that the indorsement as first made was erroneous in not expressing the ruling actually made, and that later this was corrected. Of course it is of no consequence whence the suggestions first came that this was an error, whether from the consciousness of the judge or the argument of counsel. If it was an error, it should have been corrected as soon as discovered unless rights based upon it had accrued or unless for some other reason it was too late to right the wrong. But even if there was a change of mind, from a plain oral ruling upon evidence and a decision upon the motion, to a declination to make any ruling upon the evidence or disposition of the motion as shown by the first indorsement, and then back again to the original ruling and decision as shown by the final amendment of the indorsement, the defendant fails to show that it has suffered harm. All these matters occurred after the verdict and after the discharge of the jury and pending the allowance of the main bill of exceptions, and while a motion or motions interlocutory in their nature were depending undisposed of and before any judgment. If the first written indorsement upon the motion to set aside the answer had remained unchanged upon the record until it had reached this court, it would have been necessary to send the case back for a decision of the motion because it related to a vital step toward a final judgment which could not have been entered until the motion was decided. An utter failure to dispose of the motion, such as was manifested by the first indorsement upon it, was not and could not be made the equivalent of an overruling of the motion with the effect that the defendant could stand upon what-

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ever rights might have been established, if that answer of the jury had remained as final. See *Boyd, petitioner*, 199 Mass. 262.

27. The exception of the defendant to the ruling of the court that the general verdict should stand, although the answer of the jury to the second question was set aside, must be overruled. After the answer was set aside, there was no inconsistency upon the record. The general verdict, if sound in other respects, could not have been affected by the correction of an error in the answer to a special question. The motion which was granted was not to correct the error in the record, but to set aside the answer because of the error. In this case the result was the same as if the question had never been put. *McManus* v. *Thing*, 202 Mass. 11; *S. C.* 208 Mass. 55. *Monies* v. *Lynn*, 119 Mass. 273.

28. The defendant filed a separate bill of exceptions (which is the fourth bill of exceptions here) touching, among other matters, the proceedings upon the motion to set aside the answer of the jury to the second question. In this respect the separate bill of exceptions was irregular. This subject was fully covered in the main bill without objection and could not properly be made the subject of any other bill of exceptions. The dates of the filing of these two bills are not certain from the record. It may be that a separate bill of exceptions respecting this matter was necessary originally. But when its subject matter had been included in the main bill of exceptions, the separate bill upon this point ceased to have any significance. It becomes unnecessary to consider whether there was any material difference between the two narrations, because so much of the separate bill as related to this matter should have been disallowed, for the reason that without objection it had been embodied in the main bill.

29. The defendant filed a motion that judgment be entered for it on the ground that the answer of the jury to the second question, to the effect that the defendant did not repudiate the contract, required that result. But when this answer was set aside, properly as has been pointed out, no foundation remained for the defendant's motion, and it was denied rightly. The proper way to bring to this court the correctness of this denial by the Superior Court was by appeal under R. L. c. 173, § 96, as amended by St. 1910, c. 555, § 4. It was a matter of law apparent upon the record. But it has been held that such ruling is also subject to exception

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under R. L. c. 173, § 106, as amended by St. 1906, c. 342, § 3 (see St. 1911, c. 212). *McCallum* v. *Lambie*, 145 Mass. 234.

30. This matter, embodied in the fourth bill of exceptions, was distinct and separable from the exception to the modification of the phrase of the indorsement upon the motion, which remained in the same bill improperly after the main bill was allowed. The Superior Court should have allowed this exception, and disallowed the rest of the bill. *O'Connell, petitioner*, 174 Mass. 253, 257. A bill of exceptions of this kind containing subjects distinguishable without difficulty, one or more of which is stated correctly and others not, does not come within the rule of *Horan, petitioner*, 207 Mass. 256, which held that a commingling of exceptions with a mass of irrelevant matter tending to give color to the case should be disallowed as a whole. This portion of the fourth bill of exceptions is properly before us on the commissioner's report. But the exception is overruled.

31. At the argument of these exceptions before this court the plaintiff moved that portions of the brief of the defendant be stricken out. This motion is granted, so far as it relates to "The Lost Letters" on pages 80, 81, 82, and to the beginning of the first full paragraph on page 83. The presiding judge had stated, in accordance with a stipulation of counsel, that certain letters had "been lost, without fault on the part of any person whatsoever." Reference to the subject in brief or argument was irrelevant, and should be stricken out. The present motion is in such form that it can be granted and is to be distinguished from that denied in *Commonwealth* v. *Marshall*, 211 Mass. 86. The other matters urged in this motion we do not treat as suggestions of disrespect to the trial judge, which is the only ground for expunging them.

32. The result is that the only exceptions which must be sustained are those discussed under paragraphs 5 and 6 of this opinion. They relate to the inquiry whether the plaintiff broke his contract by undertaking an agency antagonistic to his contractual obligation to the defendant. In substance, that branch of the case resolves itself into the question, was the Stevens-Duryea automobile of 1903 a competitor of the Peerless of that year? This is a simple and separable issue. It is not necessary to re-try the whole case in order to settle it. All the other issues have been decided by a trial in which no error of law is shown. The general verdict

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and answers to questions are to stand, except that to the second question, which has been set aside. The new trial is to be confined to the question above stated in substance. *Simmons* v. *Fish*, 210 Mass. 563. If it is answered in the affirmative judgment should be entered for the defendant. If it is answered in the negative judgment should be entered for the plaintiff on the verdict.

Ordered accordingly.

J. EVERETT BROWN, administrator, *vs.* WILLIAM H. THAYER & another.

RICHARD L. CREESY *vs.* GEORGE M. HARRIGAN.

SAME *vs.* WILLIAM H. THAYER.

Norfolk. March 22, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, In use of automobile, Causing death. *Law of the Road. Joint Tortfeasors. Practice, Civil*, Parties, Exceptions, New trial.

At the trial together of three actions, one under R. L. c. 171, § 2, as amended by St. 1907, c. 375, against the two owners of two automobiles by the administrator of the estate of a boy who was run into and killed by one of them, and the other two by a boy companion of the intestate of the first plaintiff against the respective owners of the two automobiles, there was evidence that before the accident the boys had been walking upon the extreme right of the travelled part of a highway, that a buggy drawn by a horse was between them and the left hand side of the street and a little in advance of them, when there was sounded the horn of the automobile of one of the defendants which was approaching at high speed from behind and was followed closely by the automobile of the other defendant, that the two automobiles had been racing for some distance and that the driver of the second had been taking no precautions to see whether other travellers were using the way, that the leading automobile at first bore directly down upon the boys and then swerved quickly to the right, passing them, that the boys meantime had become confused by the action of the first automobile and had sprung toward the middle of the highway where they were struck and knocked down and one of them was killed by the second automobile. *Held*, that there was evidence of negligence of the drivers of both automobiles which concurred to cause the injury of one boy and the death of the other; and that it could not be ruled that the law of the road, R. L. c. 54, § 2, relating to a vehicle passing another vehicle from the rear, had no application to the case.

While a separate action may be maintained by an executor or administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, against each of several persons

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whose negligent acts, otherwise disconnected, concurred to cause the death of the plaintiff's decedent, a single action against the several persons so negligent cannot be maintained.

An administrator in a single action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, improperly joined two defendants whose negligence concurred to cause the death of the plaintiff's intestate. At the trial of the action the presiding judge wrongly refused to rule that the defendants were improperly joined, and there was a verdict for the plaintiff. In sustaining exceptions by the defendants, *it was ordered* that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and, upon a discontinuance being granted, that the new trial should be confined to the question of damages.

THREE ACTIONS OF TORT, the first under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of the estate of Richard Brown, against the respective owners of two automobiles jointly for the death of the plaintiff's intestate, alleged to have been caused while he was walking on Gannett Street in Scituate by negligence of the drivers of the automobiles; the second and third actions being brought by a companion of the intestate in the first case against the respective owners of the automobiles for personal injuries alleged to have been caused by such negligence. Writs dated respectively September 18 and October 28, 1909, and November 16, 1910.

In the Superior Court the cases were tried together before *Wait*, J. There was evidence tending to show that the plaintiff Cressy, one George F. Hussy and the intestate of the plaintiff in the first case were companions in the Brookline High School; that Cressy and Hussy had come to North Scituate by the railroad to visit Brown in a cottage at Scituate Beach, and that Brown had met them at the train with his bicycle; that just before the accident the three boys were walking along the extreme right of Gannett Street, pushing the bicycle upon which rested their dress suit cases; that a buggy drawn by a horse was a little in advance of them and between them and the left hand side of the street; that the automobiles of the defendants were approaching from the rear and were racing; that the first warning of their approach was given by the blowing of the horn of the automobile of the defendant Thayer, which was leading; that when the boys heard the horn, they turned and saw the approaching automobiles, that Hussy leaped out of the road to the right, and that Brown and Cressy leaped toward the left, where they were struck by the automobile of the defendant Harrigan, which also struck

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and smashed the two rear wheels of the buggy, and, with its emergency brakes set, continued on its course for eighty feet. The automobile of the defendant Thayer in the meantime had passed to the right of Brown and Cressy, merely striking Hussy's bicycle which he dragged with him from the street.

Other facts favorable to the plaintiffs which the evidence warranted the jury in finding are stated in the opinion.

At the close of the evidence both defendants in all of the cases asked for general rulings that on all the evidence the respective plaintiffs could not recover. In the third case the defendant Thayer also asked for the following rulings:

"(3) The jury cannot find against the defendant unless they find either that his automobile struck the plaintiff or that the negligent management of the automobile caused the plaintiff in the exercise of reasonable care to receive injuries not due to the intervention of other independent agencies.

"(4) Under the circumstances shown to have existed in this case, a team proceeding along the left-hand side of the road, the fact that a servant of the defendant Thayer passed upon the right of said team is no evidence of negligence.

"(5) The law of the road as defined in R. L. c. 54 has no application in this case.

"(6) The defendant had a right in passing the plaintiff to go either to the right or to the left of the travelled part of the way."

In the first case the defendant Thayer asked for the following rulings beside the general rulings above described:

"(2) The jury cannot find against the defendant Thayer unless they are satisfied by a fair preponderance of the evidence that the negligence of his servant caused the death of the plaintiff's intestate.

"(3) If the jury find that the negligence of the servant of the defendant Thayer caused the death of the plaintiff's intestate, the jury must assess damages according to the degree of culpability of said servant.

"(4) If the jury find that the death of the plaintiff's intestate was caused by the joint negligence of the two defendants, then the damage awarded against the defendant Thayer must be according to the degree of the culpability of the servant of said defendant Thayer."

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The defendant Harrigan requested the following ruling in the first case beside the general ruling above described:

"(5) The court instructs the jury that the defendants are improperly joined in this action and the plaintiff cannot maintain his action in this form so as to recover against the defendant Harrigan."

The jury found for the plaintiff in the first case in the sum of $8,000; and for the plaintiff in each of the other two cases in the sum of $12,500; and the defendants alleged exceptions.

F. B. Kendall, for the defendant Thayer.

M. O. Garner, for the defendant Harrigan, submitted a brief.

F. E. Bradbury, for the plaintiff Brown.

A. T. Smith, (*C. W. Bartlett* with him,) for the plaintiff Creesy.

BRALEY, J. The plaintiff's intestate, and the plaintiff Creesy, were travelling on foot over a public way, and nearly parallel with them a carriage with two occupants was going in the same direction. At the time of the accident the pedestrians were on the extreme right, with the carriage slightly in advance intervening between them and the left side of the street. In their rear the automobiles of the defendants in the control and management of their respective servants were approaching intending as shown by the event to pass the team in the ordinary course of travel. The law of the road as defined in the R. L. c. 54, requires the driver of a carriage or other vehicle travelling in the same direction to pass the carriage ahead by driving to the left of the middle of the travelled part of the way, and if this requirement, as the presiding judge correctly told the jury, was inapplicable to pedestrians, it did apply to the team, and the automobiles of the defendants were vehicles within the meaning of the statute. *Lynch* v. *Fisk Rubber Co.* 209 Mass. 16, 17, and cases cited. It could not have been ruled as the defendants requested, that the law of the road had no application, for the jury were to decide whether the attempt to pass on the right of the team contrary to the statute was prudent under the circumstances. *Bourne* v. *Whitman*, 209 Mass. 155, 163. The duty of exercising ordinary care to avoid injury to the group of travellers whom the jury could have found were in plain sight for at least four hundred feet before they were reached, rested upon the drivers, for whose negligent conduct the defendants are responsible. The proper discharge of this duty depended upon the conditions by

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which they were confronted, and the judge did not err when with not undue elaboration he instructed the jury, that in passing upon the question they might consider the powerful agencies placed under their control, and the disastrous consequences to other travellers if there was mismanagement. *Nelson* v. *Old Colony Street Railway*, 208 Mass. 159, 161, 162, and cases cited. It was peculiarly a question for the judgment of the jury familiar from observation, and possibly from experience with this mode of travel. What might be due care in the management of a horse and carriage jogging along a country road, affords no standard for the measurement of the prudence of the driver of a motor car running over the same road at high speed.

The evidence descriptive of the circumstances of the collision cannot be reconciled, but after the plaintiffs have obtained a verdict the inferences from the testimony most favorable to them are to be considered in deciding the question of the liability of the defendants. *Bagley* v. *Wonderland Co.* 205 Mass. 238, 243. As the cars came up to pass the team the jury would have been warranted in finding, that the car of the defendant Thayer turned to the right while the car of the defendant Harrigan turned to the left. The width of the roadway was insufficient to permit the car on the right to pass, and its horn was not sounded until the car came almost upon the plaintiff Creesy and the intestate. It then swerved to the left bearing down directly upon them, and then moved quickly to the right. The jury could have found that being thus beset, and to escape from jeopardy, they were instantaneously forced over into the middle of the road, and in front of the car passing on the left, which gave no warning of its approach, when simultaneously both were struck and thrown to the ground, where this car passed over them instantly killing the intestate and seriously injuring Creesy. But the jury had further evidence before them which goes far to explain the extraordinary nature of the casualty as well as the inexcusable negligence of the defendants. It appeared from witnesses whose credibility and opportunity for observation were for the jury, and whose evidence as to the rate of speed at different points along the way was clearly competent and admissible, that for some distance the drivers had engaged in a trial of speed with varying success, and as they approached the team the Thayer car was leading followed closely by the Harrigan

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car. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527, 533. *Thomson* v. *Pentecost*, 206 Mass. 505, 510. *Commonwealth* v. *Brayman*, 136 Mass. 438. *Parker* v. *Boston & Hingham Steamboat Co.* 109 Mass. 449, 451. The driver of this second car admitted that he took no precautions to ascertain whether other travellers were using the way, and when the automobiles came up to go by but were parted and deflected by the position of the team, the jury well might have been satisfied, that each car had attained such velocity as to threaten instant disaster to all who were in its path. Or if put more briefly, the evidence must have convinced the jury, that the casualty sprang from an indifference on the part of each driver to the safety of other travellers, amounting to a wanton disregard of their rights. Our public ways are not designed or maintained as thoroughfares for racing automobiles, and those who use them for this purpose do so at their peril. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519, 520. It also is manifest that the jury could have found, that if the driver of the Thayer car had driven to the left of the team, or had driven at reasonable speed, or if the driver of the Harrigan car had exercised ordinary care, the accident might have been prevented. *Hennessey* v. *Taylor*, 189 Mass. 583, and cases cited; *McCrohan* v. *Davison*, 187 Mass. 466, and cases cited.

The principle is settled by our decisions, that where two or more tortfeasors by concurrent acts of negligence which although disconnected yet in combination inflict injury, the plaintiff may sue them jointly or severally, although he can have but one satisfaction in damages. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. If each contributes to the wrong as in the case at bar, the proximate cause is the wrongful act in which they concurrently participate, whether the result causes instantaneous death, or injuries which the sufferer survives. *D'Almeida* v. *Boston & Maine Railroad*, 209 Mass. 81, 87. *Oulighan* v. *Butler*, 189 Mass. 287, 293. *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168, 171. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575.

The requests of the defendants, with an exception presently to be noticed, in so far as they were not covered by the charge were rightly refused, and the instructions were unexceptionable.

But the first action is brought under the R. L. c. 171, § 2, as amended by the St. of 1907, c. 375, "If a person or corporation by

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his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin." Recovery for death caused by wrongful act was unknown to the common law. *Carey* v. *Berkshire Railroad*, 1 Cush. 475. Formerly in this Commonwealth loss of life of a passenger or of a person who was not a passenger or in the employ of the corporation, if caused by the negligence of the carrier or by the unfitness or gross negligence of its servants or agents while engaged in its business was punishable by a fine limited to a minimum or maximum amount to be recovered by indictment to the use of the widow and children of the deceased in certain proportions, or if there were no children the widow received the whole, and if neither widow nor children survived him the penalty went to his next of kin. By subsequent legislation the provision has been supplemented by the addition of an action of tort and the liability extended to persons and corporations who are not carriers of passengers. St. 1840, c. 80. St. 1853, c. 414. Gen. Sts. c. 63, §§ 97, 98; c. 160, § 34. St. 1874, c. 372, § 163. St. 1881, c. 199. Pub. Sts. c. 112, § 212; c. 73, § 6. St. 1897, c. 416. St. 1898, c. 565. R. L. c. 111, § 267; c. 171, § 2. St. 1906, c. 463, Part I, § 63. St. 1907, c. 392. *Commonwealth* v. *Boston & Maine Railroad*, 133 Mass. 383. *Kelley* v. *Boston & Maine Railroad*, 135 Mass. 448. *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, where the statutes relating to street railways are collated. The development of our legislation, and many of the decisions are reviewed by Loring, J., in *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510. And if the more recent legislation seems to indicate a tendency to assimilate the remedy to an action of tort for negligence where the injury does not result in death, yet

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the statute on which the present action is based still recognizes the punitive nature of the civil remedy by requiring the assessment of damages to be "with reference to the degree of . . . culpability" either of the employer or of his employee through whose negligence the death of a person has been wrongfully caused. *Grella* v. *Lewis Wharf Co.* 211 Mass. 54. St. 1911, c. 31. The statute may be designated as remedial for the reason that a remedy is provided where before its enactment none existed. But the damages assessed are distinctly grounded upon the defendant's culpable misconduct and are diminished or enhanced according to the degree of his delinquency. See *Commonwealth* v. *Boston & Albany Railroad,* 121 Mass. 36; *Brooks* v. *Fitchburg & Leominster Street Railway,* 200 Mass. 8; *Renaud* v. *New York, New Haven, & Hartford Railroad,* 210 Mass. 553.

The wrong in the case at bar remains joint, but because of the statute the damages must be assessed severally with separate verdicts and judgments. *D'Almeida* v. *Boston & Maine Railroad,* 209 Mass. 81, 87. It may be difficult for a jury where the wrongful acts although joint do not result from a concerted purpose to ascertain the degree of blame, and assess damages according to the culpability of each; yet the right of action is created by statute, and this requirement cannot be ignored. *Oulighan* v. *Butler,* 189 Mass. 287, 295. The plaintiff should have brought separate actions as was done in *D'Almeida* v. *Boston & Maine Railroad,* and *D'Almeida* v. *Boott Mills,* 209 Mass. 81. In *Oulighan* v. *Butler, supra,* which the plaintiff contends supports the present procedure, the action it is true had been commenced against four defendants jointly, but at the close of the evidence the plaintiff was required to elect which one of their number he would hold responsible, and having made the election, the difficulty was obviated. Where the action is on a joint contract the R. L. c. 177, § 6, provide for separate judgments if the defendants are not found jointly liable. *Taft* v. *Church,* 164 Mass. 504. But there are no provisions for separate judgments in actions of tort even if death has been caused by the concurrent acts of wrongdoers who have been joined in one suit. *Cameron* v. *Kanrich,* 201 Mass. 451, 452. See St. 1905, c. 266.

The plaintiff, whose intestate upon the evidence very plainly was not in the employment or service of either defendant, should have been required before the arguments to the jury to elect as

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to the defendant against whom he would proceed, and the attention of the judge having been directed to the distinction he should have ruled as requested, that the plaintiff could not recover damages to be assessed against both defendants, as under the statute the action could not be maintained against them jointly.

The result is, that in the last two cases the exceptions should be overruled, but in the first case the exceptions must be sustained, and the verdict set aside. The plaintiff, however, is not remediless; he can apply to the Superior Court for leave to amend by discontinuing against one of the defendants, and upon a discontinuance being granted, the new trial is to be confined to damages only. *De Forge* v. *New York, New Haven, & Hartford Railroad*, 178 Mass. 59, 64. *Whipple* v. *Rich*, 180 Mass. 477, 480.

So ordered.

EDMOND ARCHER *vs.* EDWARD H. ELDREDGE & another, trustees.

Suffolk. March 26, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

At the trial of an action by an employee against his employer for personal injuries received by reason of the unexpected starting of a hydraulic elevator, there was evidence tending to prove the following facts: The duties of the plaintiff were to operate certain hydraulic passenger elevators, to report to an engineer employed by the defendant anything that became out of order with the elevators and to do anything that the engineer asked him to do. Discovering that an elevator was stopping improperly between floors, the plaintiff notified the engineer, who went upon the top of the elevator to repair it and asked the plaintiff to come up to hold a "dog" on the shipper rope. The plaintiff went upon the elevator, when, without the shipper rope being touched by either the engineer or him, the car started upward. The plaintiff seized the shipper rope and pulled upon it and it moved, but the car continued to rise. The car was propelled by water admitted to its motor apparatus by valves. The shipper rope operated to open and close the valves. The dog in question was fastened to the shipper rope to raise it automatically at the top floor and thus automatically to cause the elevator to stop. *Held*, that the plaintiff assumed the risk of the injury that he received and therefore that he could not maintain the action.

TORT for personal injuries received by the plaintiff while in the employ of the defendants at the Hotel Bristol in Boston and

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caused by a hydraulic passenger elevator starting up while the plaintiff was on its top assisting in repairing it. Writ dated August 1, 1904.

In the Superior Court the case first was tried before *Bond*, J. A verdict was returned for the plaintiff and exceptions of the defendants were sustained, as reported in 204 Mass. 323.

There was a second trial before *Morton*, J., at which there was evidence tending to show that because the plaintiff, whose duties were to operate elevators, to report to the defendants' engineer if the elevators became out of order and to do anything the engineer asked him to do, had reported to the engineer that the elevator car in question had been stopping improperly between floors, the engineer went on top of the car and undertook to repair it and asked the plaintiff to come up to hold the "dog" on the shipper rope while he made a screw tight. The dog was intended to operate to lift the shipper rope automatically at the terminal floors of the building, the lifting of the shipper rope in turn operating on the water valves and stopping the elevator. As the plaintiff was complying with the engineer's request, the elevator, without either of them having touched the shipper rope, shot up. The plaintiff seized the shipper rope and pulled upon it and it moved, but the elevator did not stop rising and he was injured.

An expert testified for the plaintiff in direct examination in part as follows: "Q. Assuming that the . . . elevator such as has been described here . . . starts up without the shipper rope being used, whether or not in your opinion the starting is caused by means of some part of the machinery of the elevator connected with the dog? A. Nothing to do with the dog.

"Q. Assume that . . . [such an] elevator is at rest and then starts up without the shipper rope being moved, and then in attempting to stop the elevator which is going up, the shipper rope is pulled and moved up, but the elevator fails to stop, whether or not in your opinion the failure to stop is caused by means of some part of the machinery of the elevator connected with the dogs? A. Nothing to do with the dog."

In cross-examination he testified as follows: "Q. If the valve was leaking and the dog was loose the car might continue to creep up? A. It would independent of the dog, whether the dog were there or not. — Q. But if the dog were there it would still continue?

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A. Yes, sir, it would still continue. — Q. It would go slower if the dog was tight? A. It would reverse itself if the dog were there. — Q. If the dog was loose it would still continue? A. Yes, sir. . . .

"Q. Suppose the dog was tight there, suppose the valve was leaking and the dog was tight, what would the effect be? A. The elevator would reverse itself. — Q. And go down? A. And go down."

Other facts are stated in the opinion.

At the close of the evidence the judge ordered a verdict for the defendants and reported the case for determination by this court.

F. R. Mullin, (*W. P. Thompson & P. F. Spain* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendants.

BRALEY, J. While the plaintiff was on top of the car of an hydraulic passenger elevator repairing a part of the operating machinery the car which had been stopped at the fourth floor automatically started upward, and its progress being unchecked he was caught and jammed between the car and a beam at the top of the well. At the close of the evidence a verdict was ordered for the defendants, and the case is here on report. The plaintiff, who operated the elevator, knew that it had been closed for repairs, and the attendant circumstances are so fully described in the former opinion when the case first came before this court that there is no occasion for their repetition. *Archer* v. *Eldredge*, 204 Mass. 323, 324, 325. It was then determined, even if the declaration contained counts under R. L. c. 106, § 71, alleging negligence of a superintendent or of some person entrusted with superintendence, that one Wright, whose orders the defendants directed the plaintiff to obey, was not acting within the meaning of the statute, and that upon the remaining counts charging them with negligence under the statute as well as at common law in failing to provide a suitable elevator, the evidence did not show any violation of this duty, and the defendant's exceptions accordingly were sustained. The evidence, however, at the second as well as at the first trial, shows that the engineer's duty required him to keep the elevator in running order, and at his request the plaintiff voluntarily assisted in repairing the upper dog on the shipping rope, which had become defective. If the dog did not work properly

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the stopping of the elevator could not be effectively regulated, and when the elevator began to ascend it would continue on its way to the top of the well. The defect having been obvious the case of *Moylon* v. *D. S. McDonald Co.* 188 Mass. 499, where the plaintiff was ignorant of the manner in which the machinery controlled the car, is inapplicable, and the defendants were under no obligation to inform the plaintiff in the present case that the elevator had become unsafe, or to direct his attention to the specific defect which the engineer and himself were attempting to remedy. *Regan* v. *Lombard*, 192 Mass. 319, 323, 324. *Archer* v. *Eldredge*, 204 Mass. 323, 326. The plaintiff apparently does not seriously contend to the contrary, but urgently presses the argument, that "if while repairs had been in progress upon the elevator, it had started by means of some part of the mechanism quite disconnected with that undergoing repair," he should have been permitted to go to the jury. *Archer* v. *Eldredge*, 204 Mass. 323, 325. To bring himself within this exception he introduced competent evidence from which the jury could have found, that the sudden starting of the car arose from the failure of the shipper rope properly to open and close at the terminal floors the valve with which it was connected. But even if the car while stationary might not have automatically started if the valve had not leaked, the undisputed fact remains, that the valve, shipping rope and upper dog were interdependent in the operation of the elevator, and if the dog which he was repairing had been in working order the car would have stopped and not ascended, and the accident would have been prevented. We are unable to discover any substantial distinction in the essential questions presented by the record from those which were passed upon in the former opinion, and the plaintiff having assumed the risk of whatever happened, judgment for the defendants is to be entered upon the verdict. *Malden & Melrose Gas Light Co.* v. *Chandler*, 211 Mass. 226, 227.

So ordered.

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EDMOND A. FORDYCE *vs.* WILLIAM E. L. DILLAWAY & another.

Suffolk. March 26, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, Specific performance of oral trust agreement, Laches, Accounting. *Fraud. Equity Pleading and Practice*, Supplemental bill.

In a suit in equity against an individual and a corporation the plaintiff alleged that he, the individual defendant and a third person formerly had been in control of the defendant corporation and that, having been ousted from such control, they formed a competing corporation; that, to induce them to make an agreement to cease competition, the defendant corporation conveyed to the individual defendant certain securities and agreed with him in writing to pay to him a certain sum yearly for a number of years as a salary; that the individual defendant orally agreed with the plaintiff and their associate to divide such securities and salary with them in the proportion of three fifths to himself and one fifth to each of them, and that he did not carry out his agreement as to the division of the salary. The suit was heard by a single justice and a decree was entered among other things adjudging that by virtue of the oral agreement between the individual defendant and the plaintiff and their associate the defendant received the salary from the corporation in trust for the plaintiff and the other associate. Upon an appeal by the individual defendant, all the evidence being reported, it was held that the findings were warranted by the evidence, and that the appeal should be dismissed.

In a suit in equity for an accounting, if it appears that during certain years the plaintiff received from the defendant payments in settlement of the account for those years and that the payments were smaller than they should have been, but that he was induced to accept such settlements through fraud of the defendant, the account ordinarily will be reopened and the plaintiff will be given relief; but, if it appears that in the last two of these years the plaintiff accepted the decreased sums without protest when he could have asserted his rights, and that he assented to such reduced payments, not because he was misled but for unrevealed reasons, such delay or forbearance on his part will prevent the reopening of the account.

Where in a suit in equity the plaintiff seeks to have the defendant compelled to make periodical payments to him under an oral agreement as to a trust and a decree is entered adjudging that such agreement be enforced, there cannot be included in a final decree an order that the defendant also pay sums which have fallen due under the agreement during the pendency of the suit. To recover such sums the plaintiff must resort to a supplemental bill or to an amendment in the nature of a supplemental bill alleging that such additional sums have fallen due since the suit was begun.

BILL IN EQUITY, filed in the Superior Court on August 22, 1911, and on motion of the defendant Dillaway removed to the Supreme

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Judicial Court on October 23, 1911, against William E. L. Dillaway and the American Pneumatic Service Company (hereinafter called the American Company), alleging in substance that the plaintiff, the defendant Dillaway and one Arthur S. Temple, deceased, who previous to June, 1907, were in the control of the defendant corporation, were ousted from control in June, 1907, and that thereafter they, as associates, organized a competing company called the United Store Service and Tube Company (hereinafter called the United Company), and carried on business until the winter of 1909 in competition with the defendant corporation; that in the winter of 1909 the defendant corporation entered into negotiations which finally resulted in the purchase of all the property and rights of the United Company, and in an agreement between the defendant corporation and Dillaway, Fordyce and Temple that they should cease competing with it; that these negotiations were carried on for the three associates by Dillaway as agent and trustee for himself and them; that at the time of such adjustment it was understood and agreed that all the consideration paid and to be paid by the defendant corporation should be delivered and paid to the defendant Dillaway as agent and trustee for himself and associates, including the plaintiff; that "after the delivery of certain property and payment of certain sums of money to employees and certain persons who had rendered services for the United Company enterprise, it was the agreement and understanding" that the defendant Dillaway should divide the stocks, bonds, and cash received and to be received as a result of settlement between himself and the plaintiff and Temple in certain agreed proportions, different as to the stocks and bonds, but as to the cash three fifths to Dillaway, one fifth to Temple, and one fifth to the plaintiff, that the defendant Dillaway properly accounted for the bonds, but not for the stock; that about the close of the negotiations with the defendant corporation Dillaway informed the plaintiff and Temple, that because of certain legal reasons, in no way affecting their rights, the cash payment of $110,000 would come in instalments and would take the form of payment for personal or professional services to be rendered by him to the defendant corporation, but that he would receive it as trustee and pay over to each of them one fifth as he should receive it, $25,000 a year for the first two years and $20,000 for the

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next three years; that from time to time as partial distributions were made, the defendant Dillaway falsely represented that he had made payments to other persons of sums alleged to be due them, but not in fact due or paid to such persons, making said alleged payments an excuse for the retention by Dillaway of sums distributable one fifth to the plaintiff; that partial payments were received by the plaintiff during the first two years, and that on June 1, 1911, Dillaway refused to make any payment to the plaintiff out of the sum of $5,000 then received by him from the defendant corporation; that the plaintiff frequently had requested of the defendant Dillaway a full and complete accounting of the stock received by him and of all the money received by him from time to time, but that that defendant had neglected and refused to make such an accounting. The prayers of the bill were "(1) that the defendant Dillaway, as trustee for himself and associates, may be ordered to account for all stock received from the defendant corporation and all cash paid to him since February 1, 1909, whatever the nominal consideration for which such transfer and payment, or either of them may have been made by the defendant corporation to the defendant Dillaway;" (2) that the defendant corporation be enjoined from making further payments to Dillaway on account of the settlement, and (3) for general relief.

The case was heard by *DeCourcy*, J., a commissioner having been appointed to take the evidence. The single justice filed the following memorandum of his decision:

"The main issue of fact in this case is whether the quarterly payments of $1,125 from the defendant to the plaintiff were merely gifts, as claimed by the defendant, or were moneys due to the plaintiff in connection with the sale of the United Store Service and Tube Company to the American Pneumatic Service Company. On all the evidence I am satisfied that the latter is the fact. The consideration of the sale included cash, in which the plaintiff and Mr. Temple (since deceased) were to share. The defendant, who carried on the negotiations for the United Company, embodied the money consideration in the form of, or at least in connection with, a contract for his personal services, which secured the American Company from the competition of the defendant, the plaintiff, and Temple. His financial interest, experience, and relations with the plaintiff enabled him to dictate the form of the written agree-

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ments. Four thousand dollars of the annual $25,000 was to go to the plaintiff; and on Temple's death $500 was added from Temple's share.

"I am satisfied that the plaintiff asked for and expected a written agreement from the defendant, and that he would have secured it if he were in a more independent position or of more aggressive disposition.

"It is true that many of the exhibits seem inconsistent with this conclusion. But one was prepared to protect the plaintiff's share from attaching creditors; and many of them were not known to the plaintiff or were prepared at the defendant's dictation.

"I am satisfied that the plaintiff has received all that was due to him before June 1, 1911. The defendant has paid to the plaintiff the stock and bonds to which he was entitled, and the plaintiff has not shown that he is entitled to an accounting.

"Decree ordering the defendant Dillaway to pay to the plaintiff his quarterly share. As to the American Pneumatic Service Company, bill dismissed."

Later the single justice filed the following memorandum:

"Since filing the memorandum of decision in which is stated my finding that the $4,500 a year paid by the defendant Dillaway to the plaintiff for the two years beginning March 1, 1909, was a payment of money due and not merely a series of gifts, counsel have submitted a stenographic report of the testimony and argued at length as to the amount of the share payable to the plaintiff.

"I am satisfied that originally the plaintiff was to receive one fifth of the so-called 'salary,' viz., $5,000 a year for the first two years and $4,000 a year for the last three years. The $5,000 sum was later changed to $4,000, and upon the death of Mr. Temple (but relating back to March 1, 1909) to $4,500; and this last amount was paid or credited to the plaintiff and accepted by him without objection, in quarterly payments, during the two years.

"The evidence, unaided by conjecture, does not make clear the reason which induced the plaintiff to assent to this reduction from the $5,000 originally agreed upon. It may have been due, as contended by his counsel, to a statement made by the defendant that $3,000 a year was to go to one Maston, and that the plaintiff must contribute a portion of his share for that purpose.

"The influence of the plaintiff's testimony supporting this con-

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tention is weakened by his subsequent conduct, such as his failure to mention the Maston claim to Mrs. Temple. But, assuming that his testimony as to the Maston claim is true, in view of his failure to investigate this alleged claim for two years while his friendly relations to the defendant afforded ample opportunity, I am not satisfied that this was the inducing cause of his accepting the lesser amount. Under the circumstances disclosed his agreement to accept $4,500 a year for the first two years should not be set aside at this late day.

"For the last three years the plaintiff is to receive $4,000 a year out of the defendant's salary from the American Pneumatic Service Company, unless he has assented to a modification of the original agreement. I do not find that he ever agreed to any reduction from that amount. There is evidence which indicates that the defendant intended to pay the plaintiff only $3,000 a year during the last three years, and that the plaintiff had notice of such intention, yet took no action thereon. But this conduct of the plaintiff may be accounted for, in my opinion, by the facts that he had no written evidence of his claim; that his only corroborating witness, Temple, was dead; that in order to shield himself from creditors he had signed papers that left him apparently in the hands of the defendant, and that throughout he had expected the defendant to pay him the amount agreed."

A final decree was entered in substance as follows:

"(1) That the contract between the defendant Dillaway and the American Pneumatic Service Company . . . was duly executed by the parties thereto and is now outstanding and in force. . . .

"(2) That by virtue of an oral agreement and understanding entered into between the plaintiff and the defendant Dillaway at or shortly after the execution of said contract . . . the defendant Dillaway agreed that out of the sums payable to him from the defendant American Pneumatic Service Company under said contract the sum of $4,500 a year for two years and $4,000 a year for the next three years, should be received by him in trust and forthwith paid over in equal quarterly instalments to the plaintiff.

"(3) That the defendant Dillaway has neglected and refused to pay from the sums received by him from the said American Pneumatic Service Company" sums amounting to $3,000, for which and for interest and costs an execution against Dillaway

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was ordered; that the defendant Dillaway, so long as there is no breach by said Fordyce of the agreement between the plaintiff, the defendant Dillaway and Temple, previously described, "shall forthwith pay over to the plaintiff Fordyce, quarterly, said sums of $1,000 as and when payments accruing to the defendant Dillaway under said contract with the defendant American Pneumatic Service Company shall hereafter be made by said American Pneumatic Service Company to the said Dillaway."

As to the defendant corporation the bill was dismissed.

Both the plaintiff and the defendant Dillaway appealed.

G. W. Anderson, for the plaintiff.

F. Paul, for the defendant Dillaway.

BRALEY, J. The questions presented by the cross appeals are, what amount, if any, is the plaintiff entitled to recover from the defendant Dillaway, and if relief should be given, whether the final decree is supported by the averments of the bill.

The plaintiff, the defendant and one Temple, who died before suit was commenced, organized a corporation to enter into competition with the defendant, the American Pneumatic Service Company, formerly in their control, but from which they had been displaced by changes in the corporate management. After nearly two years of competition with extensive litigation between the companies concerning alleged infringment of patents either owned or controlled by the defendant corporation, the new company ceased to do business under the agreements in writing appearing in the record. It is fairly to be inferred from the oral testimony of the defence, that by reason of the business ability and large experience of the personal defendant the procurement of his services or co-operation in the future, operated as an inducement for the contracts. But irrespective of the controlling purpose whatever it may have been, this defendant received the stock and bonds which formed the consideration under the second agreement, and by an oral arrangement among themselves the stock and bonds were divided in the proportion of three fifths to himself, and one fifth each to the plaintiff and Temple. By the terms of the first agreement executed on February 23, 1909, to which neither the plaintiff nor Temple were parties, the defendant was to receive as advisory counsel in various capacities a yearly salary from the purchasing company payable quarterly during the ensuing five

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years at the rate of $25,000 a year for the first two years, and $20,000 a year for the remainder of the period. It is contended by the plaintiff, whose testimony sustains his position, that the defendant agreed to make a similar division of the salary as the instalments were received. The first agreement contained a clause, that if the second agreement should be broken by either the plaintiff or Temple the salary should be reduced very appreciably, but upon a breach by both, the reduction should be doubled. It was greatly for the defendant's pecuniary advantage, that the second agreement should not be violated. The defendant's checks show that for the first two quarters he made payments to the plaintiff at a less rate, but in explanation of this difference the plaintiff testified, that deductions were made in payment of his promissory note which the defendant held, and if this indebtedness were included these payments corresponded in amount with the agreement for division. During the succeeding six quarters the payments were reduced, and the plaintiff asks that the defendant be ordered to pay the arrearage.

The dealings between the parties do not seem to have been inconsistent with the plaintiff's claim, that his right to share in the money received as salary as well as in the stock and bonds had been recognized and conceded. Despite the defendant's positive denial of the plaintiff's statements, and his explanation of the checks as being merely gratuities, the finding of the single justice shown by his memorandum of decision, that the oral agreement relied on by the plaintiff had been proved, should not be set aside. *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 459.

Ordinarily it would have followed, that the defendant should account for the amount withheld. If the quarterly share had been computed on the amount actually received by the defendant the payments to the plaintiff for the six succeeding quarters should have been $1,250 for each quarter instead of $1,215, and the plaintiff's appeal is grounded on the refusal of the justice to order the defendant to pay the arrearage. The explanation of the defendant proffered to the plaintiff, that he had paid the difference to one Maston to whom he was under obligations for assistance in the accomplishment of some of his commercial projects, is unsatisfactory when viewed with his admission at the trial, that the money withheld had not been paid to any one, and there is much force in

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the plaintiff's argument, that he had been deliberately misled when consenting to the reduction. It has been often decided, that where fraud appears even although not directly averred in the bill, a settled account will be reopened, and the plaintiff given relief. *Farnam* v. *Brooks*, 9 Pick. 212. *Barrow* v. *Rhinelander*, 1 Johns. Ch. 550. *Rehill* v. *McTague*, 114 Penn. St. 82. *Branger* v. *Chevalier*, 9 Cal. 353. *Perkins* v. *Hart*, 11 Wheat. 237. *Williamson* v. *Barbour*, 9 Ch. D. 529. But the plaintiff accepted the decreased sum for two years without protest when he could have asserted his rights, and upon a review of his general conduct and subsequent course of dealing with the defendant the impression is not removed, that for some undisclosed purpose he preferred to make no further inquiry, and did not care to insist on a strict performance. The further finding of the single justice, that the plaintiff assented to the reduced payments not because he had been misled, but for unrevealed reasons, not having been unwarranted, he properly held, that owing to the plaintiff's delay or forbearance to press the claim it would be inequitable to reopen the account. *Foster* v. *Hodgson*, 19 Ves. 180, 185.

It is elementary as the defendant contends, that the decree should follow the pleadings, and the stating part of the bill cannot be enlarged under a prayer for general relief. *Bushnell* v. *Avery*, 121 Mass. 148. The plaintiff, however, asked for an accounting not only of the whole consideration whenever it accrued and became payable, but of the instalments the defendant had received. And although upon the evidence the relief specifically sought was too broad, yet the relief granted having been coextensive with the allegations of the bill the decree should be affirmed. *Franklin* v. *Greene*, 2 Allen, 519.

If as the plaintiff suggests further instalments have accrued since filing the bill, he must resort to a supplemental bill, or to an amendment in the nature of a supplemental bill to recover the arrears. *McMurtrie* v. *Guiler*, 183 Mass. 451, 454, 455.

Decree affirmed with costs.

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SADIE KAPIGIAN v. KRIKOR DER MINASSIAN.

Worcester. March 29, 1912. — June 19, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Marriage and Divorce. Domicil. Conflict of Laws. Evidence, Of intention.

At the trial of a libel to annul a marriage between the libellant and the libellee in this Commonwealth on the ground that the libellee had a former wife living, it appeared that the libellee was a Christian domiciled in Turkey and there had married a wife who was a Christian, that thereafter the libellee had come to this country intending to return to his domicil in Turkey, and had changed that intention only when he learned that his former wife, who had remained in Turkey, had married a Mohammedan and had adopted the Mohammedan religion, and that after this he married the libellant. It was found by the trial judge that by the law of Turkey when a wife changes from the Christian to the Mohammedan religion and marries a Mohammedan her previous marriage becomes null and void. *Held*, that, Turkey having been the domicil of the libellee as well as that of his former wife at the time of an event which under the law of that country dissolved their marriage, and such law being in its essence not contrary to the moral sense of civilized nations nor inconsistent with our policy, the dissolution of the marriage would be recognized by our courts, and that accordingly the libellee was not under a disability at the time of his marriage with the libellant.

A person whose domicil at a certain time is in issue may testify as to his intention at that time.

RUGG, C. J. This is a libel for a decree of nullity of the marriage between the libellant and libellee solemnized in this Commonwealth in 1908, on the ground that the libellee had a former wife living. These are the circumstances: The libellee was domiciled in Turkey, was a Christian, and there married a wife also a Christian, with whom he lived. In 1902, owning a small farm in Turkey, he left his wife at the home of a cousin there, and came to this country intending to earn some money and return to his farm in Turkey. He supported his wife by sending her money for about four years, when he ceased, because he learned that she had married a Mohammedan and become a Moslem. Thereafter he gave up his intention to return to Turkey, and decided to make his permanent home in Massachusetts. It was found by the

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judge of the Superior Court * to be the law of Turkey that when a wife renounces Christianity and embraces the Mohammedan religion and marries an adherent of that faith her previous marriage becomes "null and void," and that "the courts in Turkey consider that her first husband is no longer her husband, and that there is no longer any marriage tie between such wife and her former husband." The domicil of the libellee continued to be in Turkey until after he learned of the marriage of his wife with a Moslem in Turkey. The libellant was ignorant of those facts until after her marriage with the libellee, and upon learning them ceased to live with him and brought this petition. The validity of her marriage depends upon whether the libellee's former marriage was in force at the time of his marriage with the libellant.

No difficulty arises in determining the country of domicil of the libellee. It has been expressly found that Turkey continued to be his domicil until after he learned of the occurrences which under the law of Turkey put an end to his marriage with his first wife. Her domicil was then and seemingly always has been in Turkey, for it does not appear that she ever has lived in any place outside Turkey. It is a general principle of law recognized by international comity that every sovereign State has the right to determine the domestic and social status of those having their domicil within its territory. Marriage is a status which is governed by the law of the domicil of the parties. The controlling principle was stated strongly by Lord Penzance in *Wilson* v. *Wilson*, L. R. 2 P. & D. 435, at 442, in language quoted with approval in *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, 540, as follows: "The only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, more-

* *Sanderson*, J. He made an order that the libel be dismissed, and reported the case for determination by this court.

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over, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." This is the rule which has been followed by this court. *Hopkins* v. *Hopkins*, 3 Mass. 158. *Barber* v. *Root*, 10 Mass. 260, 265. *Commonwealth* v. *Lane*, 113 Mass. 458, 466. *Sewall* v. *Sewall*, 122 Mass. 156, 160. *Watkins* v. *Watkins*, 135 Mass. 83. *Blaisdell* v. *Bickum*, 139 Mass. 250. It prevails generally. *Haddock* v. *Haddock*, 201 U. S. 562, 570, 582, 583. *De Meli* v. *De Meli*, 120 N. Y. 485. *Harvey* v. *Farnie*, 8 App. Cas. 43. *Turner* v. *Thompson*, 13 P. D. 37. *Roth* v. *Roth*, 104 Ill. 35. *Undy* v. *Undy*, L. R. 1 H. L. 441. In reason the principle should apply as well to divorce as to marriage. The governing force of international policy is as strong in the one case as in the other. In *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, it was held that "according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." To the same effect is *Shaw* v. *Gould*, L. R. 3 H. L. 55, 81.

The principle is laid down generally by writers of recognized standing upon international law and conflict of laws that divorce as well as marriage is determined by the law of the country of domicil of the parties. The rule is stated in Story on Conflict of Laws, (8th ed.) § 201, in these words: "There is no doubt that a divorce regularly obtained, according to the jurisprudence of the country where the marriage is celebrated and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country." 1 Wharton, Conflict of Laws, (3d ed.) § 223. Wheaton's International Law, (8th ed.) § 151. Savigny's Private International Law, (Guthrie's 2d ed.) 148. Dicey, Conflict of Laws, 387. Taylor's International Public Law, 209. Piggott on Foreign Judgments, 275. See *Leshinsky* v. *Leshinsky*, 5 N. Y. Misc. 495, and *Miller* v. *Miller*, 70 N. Y. Misc. 368. Kindred questions have arisen as to marriage and divorce among Indians living in tribal relations and not subject to the civil law of the several States in whose territory they dwelt, who are regarded as wards of the United States possessing as to the several States some of the attributes of foreign nations. Dissolution of marriage in accordance with tribal custom has been recognized as valid by all courts which have had occasion to adjudicate rights dependent upon them. *Kobogum* v. *Jackson*

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Iron Co. 76 Mich. 498. *Compo* v. *Jackson Iron Co.* 50 Mich. 578. *Johnson* v. *Johnson*, 30 Mo. 72. *Boyer* v. *Dively*, 58 Mo. 510. *La Riviere* v. *La Riviere*, 77 Mo. 512. *Morgan* v. *McGhee*, 5 Humph. 13. *Wall* v. *Williamson*, 11 Ala. 826; *S. C.* 8 Ala. 48. *Earl* v. *Godley*, 42 Minn. 361. *Jones* v. *Laney*, 2 Texas, 342, 348. See *Kalyton* v. *Kalyton*, 45 Ore. 116.

There would be no hesitation in giving faith and credit to a dissolution of marriage between subjects of a foreign State if it was proved by a decree of a court of competent jurisdiction. But divorce as well as the marriage ceremony is a matter of social convention or governmental regulation. It is not in the nature of things controlled by immutable law, prevalent wherever civilization or Christianity exists. There is a wide diversity between the laws of different nations upon these subjects. The principle of international law being that the law of the country of domicil of the spouses affords the guide for deciding upon the commencement, continuance and ending of marriage, in reason it must govern divorce as well as every other incident of matrimony.

No conflict of jurisdiction arises in the case at bar. It is indisputable that the Turkish government had jurisdiction of both parties, because the marriage was solemnized in Turkey according to its laws, between a man and woman, the domicil of origin of each of whom was Turkey, a domicil which never had been lost by either, and who have lived together in Turkey and nowhere else as husband and wife. Hence both were subject to the law of Turkey in respect of matrimonial status. It does not matter that a circumstance rather than a decree of court constitutes under the domiciliary law a dissolution of the marriage tie. We are not concerned with forms of practice, but with the ascertainment of the law of a foreign country. When that law is ascertained, it becomes our duty under principles of international comity to give effect to that law so far as it affects the status of a subject of that foreign sovereign. It is possible that some law of a heathen country would be so abhorrent to civilization that it would not be recognized, even as establishing the status of its subjects. However that may be, such a question is not presented here. See *Ross* v. *Ross*, 129 Mass. 243, 246. In the case at bar under the law of Turkey, a public and notorious fact, which constitutes a ground for divorce in most if not all civilized countries allowing any di-

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vorce, is treated as of itself severing the marriage relation. There is nothing in this law so revolting to the moral sense of a Christian nation as to prevent recognition and enforcement by its courts. It stands upon the same footing as the provisions of the St. of 5 & 6 Will. IV. c. 54, known as Lord Lyndhurst's Act (in force until the enactment of St. 6 Edw. VII. c. 30, and St. 7 Edw. VII. c. 47), to the effect that the marriage of a widower with his deceased wife's sister was absolutely void without any decree of court. *Regina* v. *Chadwick*, 11 Q. B. 205, 235.

The result is that the domicil of the libellee being Turkey at the time of the happening of an event, which under the law of that country dissolved the marriage, such law being in its essence not contrary to the moral sense of civilized nations nor inconsistent with our policy, that marriage should be recognized by our courts as dissolved. It follows that the libellee was not under a legal disability at the time of his marriage with the libellant, and his marriage with the libellant was valid.

The testimony of the libellee touching his intent as to his domicil was competent. *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322. *Marcy* v. *Shelburne Falls & Colrain Street Railway*, 210 Mass. 197.

Petition dismissed.

The case was submitted on briefs.

J. E. Sullivan & D. F. O'Connell, for the libellant.

P. J. O'Connell & J. P. Halnon, for the libellee.

JOHN M. RYAN & another *vs.* PERLA C. LYON, executrix.

Middlesex. March 29, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Executor and Administrator. Equity Jurisdiction, To allow claim barred by special statute of limitations. *Insolvent Estates.*

In a suit in equity under R. L. c. 141, § 10, against the executrix of the will of a constable, to obtain a judgment for a claim, not prosecuted within two years after the defendant had given notice of her appointment, for a sum of money which the plaintiff had deposited with the defendant's testator to dissolve an attachment of property of the plaintiff, it appeared that the plaintiff had not the right to demand the return of the money until eight days before the expiration

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of the period of limitation, that he then demanded such return, that the defendant referred him to her counsel and to a surety company which was the surety on the official bond of the testator, that the surety company took the matter under consideration and did not communicate with the plaintiff until after the period of limitation had expired, when it refused to pay the claim. *Held*, that a finding was warranted that the plaintiff had not been guilty of culpable neglect in not prosecuting his claim within the two year period.

In a suit in equity under R. L. c. 141, § 10, against an executor praying for a judgment on a claim for money had and received by the defendant's testator not prosecuted within two years after the defendant had given notice of his appointment, where it was found, on evidence warranting such a finding, that the plaintiff had not been guilty of culpable neglect in not prosecuting his claim within the two year period, it appeared that before the plaintiff's cause of action accrued the estate of the defendant's testator had been represented insolvent and that commissioners had been appointed under R. L. c. 142. *Held*, that under R. L. c. 142, § 30, no action could have been maintained upon the plaintiff's claim before the expiration of the two year period of limitation and that therefore the plaintiff was entitled to no judgment against the defendant.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 15, 1911, and amended on May 23, 1911, under R. L. c. 141, § 10, against the executrix of the will of William H. Lyon.

The amended bill alleged that William H. Lyon, the defendant's testator, was appointed and confirmed as a constable of the city of Boston to hold office for one year from May 1, 1908, and afterwards gave bond as constable, which bond was approved on June 5, 1908, on which bond the American Surety Company of New York was surety; that on September 19, 1908, Lyon as constable made an attachment of personal property belonging to the plaintiffs by virtue of a writ issued from the Municipal Court of the City of Boston, which was dated September 17, 1908, and was returnable on September 26, 1908, and in which one Capillo was plaintiff, and that afterwards, on the same day, the plaintiffs deposited with Lyon, as constable, the sum of $200 which was the amount of the *ad damnum* of the writ and which Lyon held in place of the property attached, as provided in R. L. c. 167, § 124; that Lyon died on December 26, 1908, and that the defendant was appointed executrix of his will; that she gave her bond as executrix on February 25, 1909, and that notice of her appointment as executrix was duly published; that on February 17, 1911, the action of Capillo against the plaintiffs was settled by agreement of the parties and on that day an entry in that action was made of "Neither Party;" that on the same day

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demand was made upon the defendant for the return of the $200 deposited with Lyon and that the defendant referred the plaintiffs to her counsel and also to the American Surety Company, which was the surety on Lyon's bond as constable; that the plaintiffs through their agent saw the American Surety Company, and that the surety company took the matter under consideration, and did not report on the matter until after February 25, 1911, at which time they refused to pay the claim until judgment first had been obtained against the estate of Lyon.

The bill prayed for a judgment for the sum of $200 against the defendant.

The defendant demurred to the amended bill. The demurrer was overruled by *Morton*, J., who made a memorandum of decision as follows:

"The plaintiff was not in a position to make a demand on the estate for a return of the money till February 17, 1911, according to the allegations of the bill, and demand was made on that day on the executrix, and she referred the plaintiff to her counsel and also to the surety company. The surety company took the matter under consideration but did not communicate with the plaintiff till after February 25th when they refused to pay the demand. Under the circumstances it does not seem to me that the plaintiffs have been guilty of culpable neglect. Demurrer overruled."

Later the case was heard upon the merits by *Morton*, J., and the plaintiffs presented evidence in support of the allegations of the bill. The defendant's answer alleged that on October 11, 1909, the estate of Lyon was represented to be insolvent and that commissioners were appointed by the Probate Court to receive and examine claims against the estate.

The defendant offered in evidence a certified copy of the representation of insolvency of the estate of Lyon and the decree thereon, from which it appeared that the estate was represented insolvent and that commissioners to receive and examine claims against the estate were appointed by the Probate Court for the county of Middlesex on October 11, 1909. The admission of this certified copy was objected to by the plaintiffs solely on the ground that it was immaterial. The justice admitted it *de bene*.

The justice found that the plaintiffs were not guilty of culpable neglect in not prosecuting the action within two years and that

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justice and equity required that they should have judgment against the estate for the amount claimed. He ordered a decree for the plaintiffs, and at the request of the defendant reported the case for determination by the full court.

If the overruling of the demurrer was correct and if the finding in favor of the plaintiffs was justified upon the evidence, a decree was to be entered for the plaintiffs for the amount claimed with costs. If the overruling of the demurrer was incorrect, or if the finding in favor of the plaintiffs was not justified upon the evidence, the bill was to be dismissed with costs.

The case was submitted on briefs.

J. Nelson & D. A. Hincks, for the plaintiffs.

W. H. Thorpe, for the defendant.

BRALEY, J. The demurrer was rightly overruled. By R. L. c. 141, § 10, a creditor whose claim has not been prosecuted within two years after an executor or administrator has published notice of his appointment under § 9, may have relief in equity for the amount against the estate, if found not chargeable with culpable neglect in failing to enforce it before the statutory bar had been established. *Ewing* v. *King*, 169 Mass. 97. *Powow River National Bank* v. *Abbott*, 179 Mass. 336. *McMahon* v. *Miller*, 192 Mass. 241.

It is averred in the bill of complaint that the defendant's testator, a constable qualified to serve civil process, attached in an action against them certain personal property of the plaintiffs, which was released upon their depositing with him sufficient money to cover the amount of damages demanded in the writ. The money by R. L. c. 167, § 124, having been held to await the result of the litigation, the termination of the action by the entry of neither party dissolved the attachment, and it was payable to the plaintiffs on demand. *Radclyffe* v. *Barton*, 154 Mass. 157, 158. But pending the proceedings the attaching officer died testate, and the defendant had been appointed executrix, and only eight days appear to have remained after the disposition of the case before the plaintiffs' claim would be barred. A demand by the plaintiffs was necessary before an action could be begun, and although promptly made the defendant referred them to her counsel, and to a surety company which had become surety on the official bond of her testator. *Weston* v. *Ames*, 10 Met. 244. *King* v. *Rice*, 12

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Cush. 161, 163. The time within which an action could have been begun elapsed before any definite statement was received from the company, which declined to recognize any liability upon the bond until the plaintiffs obtained judgment against the estate. It is the purpose of the statute to give a remedy to the creditor when he acts with reasonable diligence. If the plaintiffs knew that they must proceed seasonably as the period of limitation was about to expire, the delay seems to have been largely attributable to the attitude of the defendant, and, the plaintiffs' conduct not appearing to have been censurable or blameworthy, they were ostensibly entitled to a trial on the merits. *Waltham Bank* v. *Wright*, 8 Allen, 121, 122. *Ewing* v. *King*, 169 Mass. 97. *McMahon* v. *Miller*, 192 Mass. 241. The evidence so far as reported fully supported the essential averments, and the single justice found, that the plaintiffs had not been guilty of culpable negligence in failing to prosecute their claim, and that justice and equity required that relief should be decreed.

But the plaintiffs cannot have judgment unless the claim would have been enforceable against the defendant as executrix if sued within the prescribed period of two years. *Spelman* v. *Talbot*, 123 Mass. 489, 493. The action is not brought on the testator's official bond to recover the penalty for breach of the condition and to obtain execution for the amount due. R. L. c. 173, § 6, cl. 11; c. 172, §§ 9, 10. It is instituted for money had and received to the plaintiffs' use after the lien of the attachment expired. Before the cause of action accrued the estate however had been represented insolvent and commissioners had been appointed under R. L. c. 142, and by the express provisions of §§ 30–32, the defendant was no longer liable to suit by creditors of the estate. *Herthel* v. *McKim*, 190 Mass. 522, 524.

Nor can the suit be prosecuted for the purpose of obtaining a special judgment which will enable the plaintiffs to compel the surety to make reimbursement. See *Todd* v. *Bradford*, 17 Mass. 567; *Calder* v. *Haynes*, 7 Allen, 387; *Tracy* v. *Warren*, 104 Mass. 376; *Hayes* v. *Nash*, 129 Mass. 62; *Fall River* v. *Riley*, 138 Mass. 336; *S. C.* 140 Mass. 488; *Crocker* v. *Buttrick*, 187 Mass. 461, 462. A creditor under certain conditions specified in the R. L. c. 177, § 25, may have a special judgment against a bankrupt or insolvent who has given bond to dissolve an attachment, which will enable

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him to maintain an action against the sureties, but the plaintiffs have not directed our attention to any statute permitting the entry of a special judgment against the executor or administrator of a deceased principal, whose estate is in insolvency, to enable the obligee to sue the surety where there has been a breach of his official bond given for the faithful performance of his duties as constable. The plaintiffs were not remediless. It is the decree of distribution which finally determines the amount to be paid to creditors and even if the return of the commissioners must be presumed to have been made, no decree thereon appears to have been entered. *Bowers* v. *Hammond*, 139 Mass. 360, 363. And if so the plaintiffs, within the eight remaining days, could have applied under R. L. c. 142, § 9, for an extension of time in which to present and prove their debt. *Aiken* v. *Morse*, 104 Mass. 277. *Walker* v. *Lyman*, 6 Pick. 458.

The statute granting relief in equity cannot be construed as superseding these provisions, or as recognizing a right of action by a creditor, where if suit had been promptly commenced, it must have failed by reason of the proceedings in the court of probate, and the bill must be dismissed.

Decree accordingly.

JENNIE T. AMEE & others *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Middlesex. April 1, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Easement, For railroad purposes, Abandonment. *Railroad. Evidence.*

St. 1906, c. 463, Part II, § 80, prohibiting the acquisition of a prescriptive right in the land of a railroad corporation by an owner or occupier of adjoining land, has no application where the owner in fee of land, subject to an easement of a railroad corporation, has continuously and openly used and occupied the land as his own to the exclusion of the railroad corporation and with its knowledge and acquiescence, and contends that the railroad corporation has abandoned its easement.

At the trial of a petition against a railroad corporation for registration of title, upon the issue whether a strip of the petitioner's land was subject to an easement for railroad purposes or whether if such a right had been acquired by the respondent

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it had been abandoned, the petitioner was allowed to show that he and his predecessors in title had paid taxes on the strip from 1855 to the time of filing the petition. *Held*, that it could not be said that there was error in the admission of the evidence, which tended to show the nature and extent of the petitioner's claim and that the petitioner and his predecessors had availed themselves of the alleged abandonment.

On the issue whether a railroad corporation abandoned an easement for railroad purposes acquired by it by right of eminent domain over a certain strip of land, the owner of the land who claims a title free from the easement may show that there was no petition for damages for the taking of the strip of land in question, because the fact that the easement never was paid for makes it easier to draw the inference that it was abandoned.

On the issue whether a railroad corporation abandoned an easement over a certain strip of land, the owner of the land may show the former existence of a fence marking the boundary of the railroad location as excluding the strip, and that this fence had been the continuation of a fence which extended beyond his land, and he also may show that he used the strip for an orchard and garden and for the erection of a shed.

At the trial of a petition for registration of title against a railroad corporation, upon the issue whether an easement for railroad purposes over a strip of the petitioner's land had been abandoned by the respondent or its predecessors, a witness for the petitioner, who testified that he was employed in the city engineer's office, was allowed, against the respondent's exception, to testify that the city engineer's plans showed the boundary of the railroad location as excluding the strip in question. It did not appear that the plans were offered in evidence. They were not shown to have been made in the performance of any duty required by law or to have been connected in any way with the respondent, and it was not shown that the person who made them was deceased. *Held*, that the admission of the evidence was a material error.

PETITION, filed in the Land Court on July 28, 1910, to register the title to two parcels of land situated on opposite corners of Waverly Street and Putnam Avenue in Cambridge.

In the Land Court the case was heard by *Clark*, J. The controversy related to a strip of land sixteen and twenty-five one hundredths feet wide at the end of one of the parcels of land where such parcel adjoined the location of the Grand Junction Branch of the respondent's railroad. The respondent had no deed of the strip and admitted that the fee was in the petitioners subject to the easement for railroad purposes claimed by the respondent. The respondent claimed as successor of the Boston and Worcester Railroad Corporation. It contended that the easement extended to a line forty-one and twenty-five one hundredths feet from the centre line of its railroad location, while the petitioners contended that the easement extended only to a line twenty-five feet from such centre line.

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The judge found that the respondent had become entitled to use the strip for railroad purposes, but found that the Boston and Worcester Railroad Corporation and the respondent had abandoned the strip.

The judge, subject to exceptions by the respondent, admitted evidence of the following matters: (1) Of the payment of taxes by the petitioners and their predecessors in title on the strip in dispute from 1855 to date; (2) that no petition for damages had been filed with the county commissioners for the taking of this land; (3) that an old fence had existed about on the twenty-five foot line from 1858 or earlier until about 1901; (4) that this fence was a continuation of an old fence extending in either direction for some distance beyond the petitioners' land; (5) that in 1901 the petitioners built a shed close to the old line of the fence and that it stood there for about six years, although used only for a little over a year; (6) that before 1901 the petitioners had used this lot for an orchard and a garden; (7) that the city engineer's plans showed that the railroad location was fifty feet wide at this point [that is twenty-five feet from the centre line].

The testimony in regard to the city engineer's plans was given by one Davis, called as a witness by the plaintiffs, who testified that he was employed in the office of the city engineer of Cambridge. It did not appear that the plans were offered in evidence.

The rulings requested by the respondent, besides those referred to in the opinion as having been made immaterial by the findings of the judge, were as follows:

"6. There is no evidence of abandonment of this right by the Boston and Worcester Railroad Corporation.

"7. Non-use of any part of said location by the Boston and Worcester Railroad Corporation or the respondent is no evidence of abandonment.

"8. Under St. 1861, c. 100, now St. 1906, c. 463, Part II, § 80, no length of possession or occupancy of the respondent's location by the petitioners creates in them any right to such location of said respondent."

"12. Upon the whole case the burden of proof is upon the petitioners."

The judge made the ruling numbered 12 and refused to make the rulings numbered 6, 7 and 8. He ordered a decree for a registra-

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tion of the petitioners' title free from any easement of the respondent; and the respondent alleged exceptions.

The case was submitted on briefs.

G. H. Fernald, Jr., for the respondent.

C. M. Ambrose, for the petitioners.

SHELDON, J. The judge of the Land Court found that the easement which otherwise would have been vested in the respondent had been abandoned, and in our opinion there was evidence which warranted this finding. *Westcott* v. *New York & New England Railroad*, 152 Mass. 465. *Bicknell* v. *New York & New England Railroad*, 161 Mass. 428. *New York, New Haven, & Hartford Railroad* v. *Benedict*, 169 Mass. 262, 267. This made the respondent's first, second, third, fourth, fifth, ninth, tenth and eleventh requests for rulings immaterial. Its sixth and eighth requests were properly refused. St. 1906, c. 463, Part II, § 80, does not apply to a case like this, where the owner of the fee, subject to an easement in favor of the respondent, has continuously and openly used and occupied the land as his own to the exclusion of the respondent and with its knowledge and acquiescence. See *Harding* v. *Biggs*, 172 Mass. 590, 593, 594; *Hall* v. *Boston & Maine Railroad*, 211 Mass. 174. It is not a question of the acquirement of rights in the land of a railroad company by an owner or occupier of adjoining land. Its twelfth request was given. The seventh request dealt only with a single one of the facts in evidence and need not have been given.

The petitioners were allowed to show that they and their predecessors in title had paid the taxes on this strip of land since 1855. We cannot say that this was wrong. *Enfield* v. *Woods*, *post*, 547. It tended to show the nature and extent of their claim, and that they had availed themselves of the abandonment which was claimed. Evidence that there had been no petition for damages for the taking of this strip was competent. That the easement never had been paid for made the inference of its abandonment easier to draw. As to this question, it was the converse of *Hummel* v. *Cumberland Valley Railroad*, 175 Penn. St. 537, 539, and *Canton Co.* v. *Baltimore & Ohio Railroad*, 99 Md. 202.

Evidence as to the location and character of the fence and the time of its existence was competent. It was a reasonable inference that it had been erected by the respondent's predecessor, or with its

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consent, and adopted by the respondent as the boundary of the land over which it claimed and exercised an easement. And evidence that it was the continuation of a fence beyond the petitioners' land tended to strengthen this inference. In this respect the case of *Smith* v. *New York & New England Railroad*, 163 Mass. 569, is different.

The evidence as to the use of this strip for an orchard and garden and for the erection of a shed was plainly competent.

But we see no ground for the admission of the testimony as to what was shown by the city engineer's plans. *Smith* v. *New York & New England Railroad*, 163 Mass. 569, 573. They were not ancient plans; they were not shown to have been made in the performance of any duty required by law; they were in no way connected with the respondent. They simply showed the unsworn statement as to a material question made out of court by a third person who was not shown to be deceased. The admission of this testimony was excepted to. It seems to have been considered by the judge, and may have turned the scale in favor of the petitioners. He said that he gave very little weight to some other evidence the admission of which was excepted to; but he made no similar statement as to this.

This evidence was wrongly admitted, and the entry must be

Exceptions sustained.

THOMAS S. BORDEN *vs.* SAMUEL FINE & another.

Suffolk. April 15, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Sale, By sample. *Contract*, Performance and breach, Consideration. *Waiver.*

In a contract of sale by sample there is an implied warranty that the goods shall correspond with the sample in quality, and if the goods shipped under such a contract are of a quality inferior to the sample the buyer either may refuse to receive them or may retain them and recover damages.

Where there is a contract of sale by sample of cotton sweepings to be shipped in bags, the fact that the buyer had an opportunity for inspection before the bags were shipped to the consignee and that he made an examination of certain bags and rejected such portions as he observed to be defective, does not necessarily de-

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prive him of the right to claim damages if on delivery to the consignee the cotton sweepings are found to be of a quality inferior to the sample, and it is a question of fact whether the buyer waived the implied warranty and accepted the contents of the bags as being in accordance with the contract.

The relinquishment of a claim for damages for the breach of a contract of sale by sample by the delivery of goods of inferior quality is a good consideration for a promise of the seller to indemnify the buyer for any loss suffered by him in selling the goods.

CONTRACT for $223.84 on an alleged special promise of the defendants to reimburse the plaintiff for his loss on the sale of certain cotton sweepings purchased by sample by the plaintiff from the defendants. Writ in the Municipal Court of the City of Boston dated July 6, 1910.

On appeal to the Superior Court the case was tried before *Bell*, J., without a jury. The facts in favor of the plaintiff which could have been found upon the evidence are stated in the opinion. The defendants asked the judge to make the following rulings:

"1. That the sale set forth and contained in the plaintiff's declaration was a sale of merchandise without representation, and was not a sale by sample.

"2. That the plaintiff, at the time of purchase, had a full opportunity to and did inspect the goods prior to delivery.

"3. That the defendants saw the bags while being filled, and had a full opportunity to ascertain the contents, and that the defendants did so ascertain the contents.

"4. That the delivery was made at the defendants' place of business, and an acceptance of said goods in law was made at the same place.

"5. That the plaintiff did not inspect shipments within a reasonable length of time after date of delivery. Therefore he must be presumed in law to have accepted such property as was delivered in satisfaction of the order placed.

"6 If it shall be established that the defendants made the promise complained of, such promise or agreement was without consideration.

"7. That at the time the plaintiff alleges the promise or agreement was made with him by the defendants, there was no obligation of the defendants to make such promise, and the plaintiff had no claim on said defendants in force at law.

"8. If there was any liability from the defendants to the plain-

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tiffs, such liability was waived and accord and satisfaction entered into between the plaintiff and the defendants at the time when the defendants sold to the plaintiff at a reduced price the cotton, which the plaintiff furnished to 'sweeten' the goods already shipped."

The judge refused to make any of these rulings. He found for the plaintiff in the sum of $231.31; and the defendants alleged exceptions.

The case was submitted on briefs.

J. H. Blanchard, for the defendants.

H. C. Dunbar, for the plaintiff.

BRALEY, J. The contract for the purchase of the cotton sweepings being oral, its terms are to be ascertained from the evidence, which would have warranted the judge, before whom the case was tried without a jury, in finding that the sale had been consummated upon the representations of the defendants that the goods in bulk to be delivered in the future should be like the sample exhibited. *Atwater* v. *Clancy,* 107 Mass. 369. And there would be a breach of the implied warranty, entitling the plaintiff to rescind upon reasonable notice to the defendants if the four shipments in question fell below the quality bought, or he might retain the cotton and recover damages. *Whitmore* v. *South Boston Iron Co.* 2 Allen, 52. *Pike* v. *Fay,* 101 Mass. 134. *Gilmore* v. *Williams,* 162 Mass. 351, 352. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476. *Procter* v. *Atlantic Fish Co.* 208 Mass. 351, 354. St. 1908, c. 237, §§ 14, 16.

The sample must be deemed to have been one of the essential terms of sale, and, although the plaintiff availed himself of the opportunity for inspection before the shipments to his consignee, the cotton had been bagged by the defendants, and he testified, that during the customary examination* he rejected such portions as he observed to be defective, but the bags were not emptied, and the remainder was expected to be in conformity with the sample. It was a question of fact independently of the place of delivery, whether the plaintiff waived the warranty, and accepted the contents of the bags, and whether after arrival at the place of business of the consignee the cotton upon assortment proved to be of

* The plaintiff testified that he cut open such bags as he selected for the purpose.

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inferior quality. *Taylor* v. *Cole*, 111 Mass. 363. *Androvette* v. *Parks*, 207 Mass. 86.

The plaintiff's evidence, if believed, having supported his contention, that there had been a breach, and that he had not relinquished his right to insist upon performance of the contract, these issues of fact, as well as the further issue whether after receiving information from the consignee he seasonably inspected the cotton, and gave notice to the defendants of the deficiency, with his claim for reclamation, are settled conclusively in his favor by the judge's finding. *Brigham* v. *Lally*, 130 Mass. 485. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89. *Androvette* v. *Parks*, 207 Mass. 86, 90. St. 1908, c. 237, § 49. The first, second, third, fourth and fifth rulings could not have been given.

It follows that there was a valuable consideration for the alleged promise of the defendants to reimburse the plaintiff for the difference between the price paid and the price obtained at the resale, which according to his evidence he made at their request. *Blount* v. *Wheeler*, 199 Mass. 330. The testimony is conflicting as to the existence of such an agreement, but the judge, as shown by his findings, must have accepted the plaintiff's statements as controlling, and the sixth and seventh requests became inapplicable.

The defense of accord and satisfaction is not raised by the answer. *Grinnell* v. *Spink*, 128 Mass. 25. But apart from any question of pleading the plaintiff denied that his purchase, after the defendants' failure to perform, of certain additional cotton of higher grade was in settlement and adjustment of his demand for damages, and the judge, not having been bound to accept the testimony of the defendants to the contrary, rightly refused to give their eighth request.

The exceptions to the admission of evidence not having been argued must be treated as waived.

Exceptions overruled.

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ISRAEL NESSON *vs.* CHARLES F. ADAMS.
SAME *vs.* JOHN B. COOK.

Middlesex. May 20, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant, Eviction. *Evidence*, Best and secondary.

In an action on a covenant in a lease for the rent of a suite of rooms in an apartment house, the defense relied upon was an alleged eviction. By the terms of the lease the plaintiff covenanted to light and keep clean the common stairs of the building and to supply elevator service. There was evidence that the elevator was not run regularly and that frequently the defendant and his family were compelled to use the stairway, that the plaintiff failed to light the common stairs and the corridor through which the defendant and his family were obliged to walk and that this source of danger was aggravated and a nuisance created by the presence of garbage carelessly scattered on the floor of the corridor by the janitor and permitted to remain there for days, that the plaintiff persisted in thus maintaining the portions of the building under his control after notice that such maintenance would result in the departure of the defendant, and that thereupon the defendant abandoned possession of the suite. *Held*, that it could not be said as matter of law that there was no evidence on which the jury under proper instructions might find that the defendant was justified in treating the condition of the premises and the manner of their maintenance as an eviction.

It is proper to admit in evidence a copy of a material letter written to a party in an action of contract, where there is evidence that the letter was mailed and that the party to whom it was addressed received and credited a check which was enclosed in the letter.

TWO ACTIONS OF CONTRACT, each upon a covenant in a lease for the rent of a suite of rooms in an apartment house on Massachusetts Avenue in Cambridge. Writs in the Third District Court of Eastern Middlesex dated respectively October 21, 1908, and March 20, 1909.

On appeal to the Superior Court the cases were tried together before *Wait*, J. The evidence is described in the opinion. The letter of the defendant Adams to the plaintiff, referred to in the opinion, complained about the condition of the premises and stated that unless these conditions were remedied they would be treated as sufficient cause for leaving the apartment and ceasing to pay rent. The plaintiff denied receiving the letter and objected to the

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admission of a copy of it. There was evidence that the letter was mailed and that it enclosed a check for the payment of rent due on the day of its date, which was received and credited by the plaintiff. The judge admitted the copy of the letter and the plaintiff excepted.

At the conclusion of the evidence the plaintiff asked the judge to rule that there was no evidence of a breach of the condition of the lease, and to order a verdict for the plaintiff in each case. He also asked the judge to rule in each case that on all the evidence the verdict should be for the plaintiff. The judge refused to make the rulings requested and submitted the cases to the jury "under instructions not objected to." The jury returned a verdict for the defendant in each of the cases; and the plaintiff alleged exceptions.

The cases were submitted on briefs.

G. W. Reed, for the plaintiff.

H. W. Beal, for the defendants.

DeCourcy, J. These are two actions for rent under leases, and were tried together as the facts were substantially alike. The main question argued is whether the evidence warranted the jury in finding an eviction by the plaintiff lessor, operating as a defense.

It is not contended that the tenants were expelled by the assertion of a paramount title, and by process of law, in accordance with the original and technical meaning of an eviction. 16 Cyc. 820. Nor were they physically turned out of possession of the leased premises. But it is contended that the acts of the plaintiff resulted in a substantial interference with the defendants' right of possession or enjoyment amounting to an eviction, as the term is used at the present time, and that his acts indicated an intention that they should no longer continue to occupy the leased premises.

The suites of rooms occupied by the defendants were in an apartment house in Cambridge named the "Regent," and they had paid the accrued rent up to the time they moved out. Under the terms of each lease the plaintiff covenanted to light and to keep neat and clean the common stairs of the building, to heat the leased premises and supply them with hot and cold water and elevator service. There was evidence that the elevator was not run regularly and was shut down for days at a time; that the ele-

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vator in the plaintiff's adjoining and connecting building, the "Majestic," was sometimes used by the defendants, and then they reached their suites by walking through the corridor in the latter building; that frequently it was impossible to get any elevator service in either the Regent or the Majestic, because there was no elevator man present, and they were compelled to use the stairway; that the plaintiff failed to light the common stairs, the landings adjacent thereto, and the corridor through which the defendants and their families were compelled to walk, and that this source of danger was aggravated, and a nuisance created, by the presence of garbage carelessly scattered on the floor of the corridor by the janitor and permitted to remain there for days; that the supply of hot water was irregular and not furnished when most needed. This and other similar evidence was strongly controverted by the plaintiff, but its weight was for the jury. If believed it would warrant a finding that the defendant or those acting by his authority kept the approaches to the leased premises in such condition that the suites became unsuitable for the purposes for which they were leased, and further that the plaintiff persisted in so maintaining the portions of the building under his control after complaints had been made to him and his agents and notification given that it would result in the departure of the tenants.

It was said by the court in *Royce* v. *Guggenheim*, 106 Mass. 201: "Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons possession, may be treated as an eviction." Although this is an extreme case we cannot as matter of law say that there was no evidence for the jury on the issue of an eviction and of an election by the lessees to abandon the premises in consequence thereof; and as no exception was taken to the charge we must assume that the jury were fully instructed as to the law. *McCall* v. *New York Life Ins. Co.* 201 Mass. 223, and cases cited. *Voss* v. *Sylvester*, 203 Mass. 233.

The letter of the defendant Adams to the plaintiff was rightly admitted in evidence. *Swampscott Machine Co.* v. *Rice*, 159 Mass. 404. *McKay* v. *Myers*, 168 Mass. 312.

Exceptions overruled.

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MARY E. BUSHBY & another, executors, *vs.* SARAH S. NEWHALL & another.

Essex. May 20, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Devise and Legacy, Residuary clause.

A will contained the following clause: "Whereas I wish to distribute my . . . personal effects among my friends but am not now ready to indicate what that distribution shall be, I therefore hereby declare that I intend to indicate such distribution by a letter to accompany this my last will which I wish to be taken and treated as a part of my said will." It did not appear that any such letter ever was written. The will contained a general residuary clause. *Held*, that the testator's personal effects, left undisposed of under the clause above quoted, were to be distributed in accordance with the residuary clause of the will, since there did not appear in the will an intention that in no event should they so pass.

DECOURCY, J. The will of Mary Jane Busby contained the following clause: "Whereas I wish to distribute my wardrobe and personal effects among my friends but am not now ready to indicate what that distribution shall be, I therefore hereby declare that I intend to indicate such distribution by a letter to accompany this my last will which I wish to be taken and treated as a part of my said will." No such extrinsic document was in existence at the time the will was executed, nor later, so far as appears, and concededly no legal disposition of the property was made under this clause. *Thayer* v. *Wellington*, 9 Allen, 283. The executors petition for instructions as to whether the wardrobe and personal effects are made a part of the residue under the will or pass to the next of kin as intestate property.

A general residuary clause such as that contained in this will is designed to prevent a partial intestacy. It provides not only for the property remaining above what the will purports to dispose of, but also for that which it undertakes to dispose of but fails to do so effectively. Thus, except where the beneficiary is a child or other relation of the testator (R. L. c. 135, § 21), a legacy or devise that lapses on account of the death of the legatee or

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devisee before the period arrives for its payment falls into the residuum. *Lovering* v. *Lovering*, 129 Mass. 97, 100. The same disposition is made of a devise or legacy that is revoked, *Bigelow* v. *Gillott*, 123 Mass. 102, and of one that is void. *Batchelder, petitioner*, 147 Mass. 465, 468. In all these instances, as in the case at bar, the testator expected the gift to go another way than as part of the residuum. But as the court say in *Thayer* v. *Wellington, supra*, "we take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

No such clear intention is manifested in this will. Presumably the testatrix meant to dispose of all her property under the residuary clause unless she should effectively provide otherwise by letter. It may be that she failed to write the intended letter, or that she wrote and destroyed it for the reason that she changed her mind and concluded to have this property go to the residuary legatees. But whether the failure to alter the definite provisions in her will arose from accident or design, no future determination could effectively take this property out of the residue unless expressed in a codicil or subsequent will legally executed as a testamentary instrument.

We are of opinion that the wardrobe and personal effects referred to in the first section of the will are part of the residue of the estate. This renders it unnecessary to determine what property mentioned in the inventory is "wardrobe and personal effects." The decree of the Probate Court is to be affirmed.

So ordered.

The case was submitted on briefs.

J. W. Allen & A. A. Silton, for the next of kin.

A. B. Tolman, for the residuary legatees.

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JOSIAH BABCOCK *vs.* MABEL H. SLATER.

Norfolk. May 21, 1912. — June 19, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Tax, Assessment. *Domicil. Res Judicata.*

In an action by a tax collector of a town for the amount of a tax on personal property the defendant contended that at the time of the assessment of the tax his domicil was in another town. A judge who heard the case without a jury found specially, on evidence which warranted the finding, that thirteen months before the tax was assessed the defendant while in a house belonging to him in the other town had intended to make it his home, but that he did not do so by his acts, and found for the plaintiff. *Held*, that the finding for the plaintiff was warranted.

In an action by the tax collector of a town for the amount of a tax assessed upon personal property of the defendant, a decision of the board of appeal under St. 1909, c. 490, Part III, § 68, affirming, on an appeal by that town, a decision of the tax commissioner under St. 1906, c. 463, Part II, § 217, determining that the proportion of the franchise tax corresponding to certain shares of a Massachusetts railroad corporation, which were owned by the defendant at the time of the assessment of the tax which was the basis of the action, was due to a town other than the plaintiff's, is not an adjudication, binding on the plaintiff in favor of the defendant, to the effect that the defendant's domicil was in such other town.

CONTRACT, by the collector of taxes of the town of Milton to recover the amount of a tax assessed upon real estate and personal property of the defendant for the year 1906. Writ dated December 9, 1907.

The defendant admitted her liability to pay the tax upon her real estate.

The case was heard by *Fessenden*, J., without a jury. The evidence relating to the decision of the board of appeal, referred to in the opinion, was a record of an appeal by the town of Milton from a decision of the tax commissioner giving to the town of Webster the corporation tax on certain shares of the stock of Massachusetts railroad corporations owned by the defendant on May 1, 1906. The board's decision affirmed that of the tax commissioner. The trial judge admitted the evidence and ruled that it was not conclusive; and the defendant excepted.

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The defendant's husband died on August 12, 1899. The improvements on the Milton estate mentioned in the opinion began in 1902. Other facts are stated in the opinion.

The judge found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

S. L. Whipple, W. R. Sears & H. W. Ogden, for the defendant.

A. Hemenway & R. W. Dunbar, for the plaintiff.

SHELDON, J. It could not have been ruled as matter of law that the plaintiff was not entitled to recover. It could be found that after the death of her husband the defendant resumed her domicil of origin in Milton, and had not since changed her domicil. She had inherited from a parent an undivided interest in a large estate in Milton, and afterward acquired the whole title therein. Upon this estate she built a large and costly house, furnished it completely, and appears to have resided there when she was not travelling or temporarily sojourning in other places. She paid without objection taxes assessed upon her general personal estate in Milton during the years 1901 to 1905, inclusive. She paid no taxes upon her general personal estate in Webster, which she now alleges to have been her domicil, until the year 1908, and only during the years 1905, 1906, and 1907 a small sum on furniture and horses, which seem to have been assessed to her with real estate which she owned in that town. R. L. c. 12, § 23, cl. 3. She made only rare and brief visits to her house in that town. She went to Webster on March 18, 1905, to arrange for the opening of her house for occupation in the early spring, and she then caused herself to be registered as a voter in that town. Her stay however was very short, apparently only for that day. Soon after the middle of the next April she again went to Webster, and remained there until about May 13, when she returned to Milton, and there abode until about the first day of June, when she went to Bar Harbor. From that summer resort she returned to Milton, and remained there until about January 30, 1906, when she went to Washington, remaining there until May 16, 1906. In April, 1905, she was elected a trustee of the public library in Webster for the term of three years, and she accepted this office and acted as such trustee. She testified however that she never had voted in Webster, and never had attended a meeting of the trustees of the library.

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We find no evidence that before her visits to Webster in 1905 she spent any whole day or night in that town after 1901, except her testimony that she never had been in America on Memorial Day without going to the Webster cemetery. She received in 1904 two assignments of mortgages in which she was described as of Milton. When she went to Webster in April, 1905, she had a piano and some plants and furniture moved thither from her house in Milton, and afterwards brought back to Milton. She issued cards for "at homes" in Milton, but never since 1899 had any cards with Webster as an address upon them.

Manifestly upon this evidence, if there were nothing more, the trial judge was warranted in finding that Milton was her domicil on May 1, 1906. Her payment of personal taxes in Milton was, as against her, some evidence that her domicil was there. *Harvard College* v. *Gore*, 5 Pick. 370, 374. *Lyman* v. *Fiske*, 17 Pick. 231, 235. *Mooar* v. *Harvey*, 128 Mass. 219, 220. *Mitchell* v. *United States*, 21 Wall. 350, 353. Her acceptance of deeds describing her as of Milton had the same tendency. *Weld* v. *Boston*, 126 Mass. 166. The apparent fixity of her residence at Milton as her regular home tended strongly to support the finding which was made.

The judge found specially that about the middle of April, 1905, while she was actually in her Webster house, she had the intention of making Webster her home, but that she did not by her acts make it her home. This finding does not help her. To establish a change of domicil, fact and intent must concur. *Holmes* v. *Greene*, 7 Gray, 299, 300. The mere desire to have a domicil in a certain place with the intention that it shall be so is not enough, where, as here, there is no actual change of abode and apparently no intention of performing any of the acts which are necessary to constitute such a change. *Jennison* v. *Hapgood*, 10 Pick. 77. *Chicopee* v. *Whately*, 6 Allen, 508. *Viles* v. *Waltham*, 157 Mass. 542. *Olivieri* v. *Atkinson*, 168 Mass. 28, 29. *Dickinson* v. *Brookline*, 181 Mass. 195. *Barron* v. *Boston*, 187 Mass. 168. The purpose to change is not enough, unless carried into execution. *Thorndike* v. *Boston*, 1 Met. 242, 247. *Thayer* v. *Boston*, 124 Mass. 132. *Pickering* v. *Cambridge*, 144 Mass. 244, 245, 246, 248. *Gardiner* v. *Brookline*, 181 Mass. 162, 165.

The decision of the board of appeal is not decisive in this case. That decision is by the statute "final and conclusive" as to the

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distribution of the so called corporation tax. R. L. c. 14, §§ 62, 65. St. 1903, c. 437, § 87. St. 1906, c. 463, Part II, § 217. St. 1909, c. 490, Part III, § 68. As between the towns of Milton and Webster, it settled absolutely their right to the taxes assessed for the securities in question for that year. But it bound only those towns and only as to themselves. Like any judgment, it bound only parties and privies. It was not a judgment *in rem* or one that settled a status or a public right, like the laying out of a highway or the determination of a right to a public office. *Gilkey* v. *Watertown*, 141 Mass. 317. *Hadley* v. *Mayor of Albany*, 33 N. Y. 603. *Beall* v. *State*, 9 Ga. 367. *Longinette* v. *Shelton*, 52 S. W. Rep. 1078. *Rubber Co.* v. *Goodyear*, 9 Wall. 788. Nor is this like the question presented where the liability of an officer or member of a corporation or *quasi* corporation depends upon the recovery of a judgment against the corporation itself, as in *Norfolk* v. *American Steam Gas Co.* 108 Mass. 404, 406, and *Gaskill* v. *Dudley*, 6 Met. 546. Mrs. Slater would not have been bound by this decision if she had chosen to contend that she was not liable to taxation in Webster upon her personal property. Neither can this plaintiff be bound by it as to her. *Burlen* v. *Shannon*, 3 Gray, 387. We know of no ground for saying that she was privy to this proceeding before the board of appeal, of which she was not entitled to notice, in which she had no right to be heard, and in which no question affecting her individual rights was to be decided. The mere fact that the same question is involved here which was passed upon there is not material. *Hubert* v. *Fera*, 99 Mass. 198. *Barney* v. *Tourtellotte*, 138 Mass. 106. *Sturbridge* v. *Franklin*, 160 Mass. 149. *Dallinger* v. *Richardson*, 176 Mass. 77. *Duffee* v. *Boston Elevated Railway*, 191 Mass. 563.

As there was no erroneous ruling of law at the trial and the findings made were warranted by the evidence, we cannot interfere with the result which was reached. *Thayer* v. *Boston*, 124 Mass. 132, 143. *Coffin* v. *Grace*, 198 Mass. 104.

Exceptions overruled.

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COMMONWEALTH *vs.* BERTRAM G. SPENCER.

Hampden. May 23, 1912. — June 22, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Homicide, Insanity as a defence. *Insane Person. Superior Court. Jury and Jurors. Practice, Criminal,* Commitment of defendant to hospital for insane for observation, Examination of jurors in capital case, Argument of counsel. *Evidence,* Relevancy and materiality, Admissions and confessions, Opinion: experts, Absence of witness, Presumptions and burden of proof. *Husband and Wife.*

St. 1909, c. 504, § 103, provides that if a defendant in a criminal case is, at or before the time appointed for trial, "found by the court to be insane or in such mental condition that his commitment to a hospital for the insane is necessary for" his "proper care or observation . . . pending the determination of his insanity, the court may commit him to a State hospital for the insane under such limitations as it may order," and that, if in the opinion of the trustees and superintendent of the hospital he is restored to sanity, he forthwith shall be restored to the jail from which he was removed, there to be held in accordance with the terms of the process by which he was originally committed. *Held,* that the statute does not delegate solely to such trustees and superintendent the determination of the question, whether such defendant shall remain longer at the hospital.

Where under St. 1909, c. 504, § 103, a defendant who has pleaded not guilty to the charge of murder is committed to a State hospital for the insane for observation "until the further order of court," monthly reports to be made to the court by the hospital authorities, the court upon its own motion may order him returned to the jail from which he was transferred and determine for itself the question of his insanity upon the reports made by the hospital authorities or upon any other competent evidence. Such action of the court would not be a violation of the Fourteenth Amendment to the Constitution of the United States.

After a defendant in an indictment for murder returned in Hampden County had been committed to a State hospital for the insane in Plymouth County under St. 1909, c. 504, § 103, for observation as to his sanity "until the further order of court" and had been under observation there for ten months, the Chief Justice of the Superior Court wrote a letter, which did not bear the seal of the court, to the sheriff of Hampden County directing him to "cause" the defendant "to be removed therefrom to the jail at Springfield" to be held there subject to the process by which he was committed to that jail originally, and the defendant was removed to Springfield accordingly. Three months and a half later, on the day assigned for the trial of the case, the defendant moved that he be committed to the State hospital for the insane on the ground that he had not been returned therefrom legally. In denying the motion on the ground that the court under

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the statute had power to make the order remanding the defendant to jail, it also was *held*, that the informal character of the order in this case was immaterial.

The defendant in an indictment for murder, who relied upon a defense of insanity, asked the presiding judge before the empanelling of the jury to make specific inquiries of each proposed juror as to whether he believed in punishing crime if it was committed by an insane person, whether he believed that insane or degenerate persons should be put to death and whether he would acquit the defendant if he believed him to have been insane when he committed the crime. The judge refused the request of the defendant and asked each proposed juror the questions specified in R. L. c. 176, § 28, after having explained carefully to all of the panel the meaning of those questions. It did not appear that there was any reason to fear that any juror would ignore the defense of insanity and there was no evidence with reference to any of the proposed jurors. *Held*, that the matter of putting such questions was within the judge's discretion, and that he exercised his discretion wisely.

At the trial of an indictment for murder an eyewitness of the crime, who is testifying as to events immediately preceding it and has stated that she was at her home and was engaged with the deceased in solving a picture puzzle when the clock struck eight, may be allowed to state that when the clock struck the deceased made a remark, if there is further evidence that at that very time the defendant was in the house and that the murder was committed very shortly thereafter.

At the trial of an indictment for murder where the defense is insanity evidence is admissible which tends to show that, on the way to jail after his arrest the defendant said to the chief of police of the city where he lived, "Do with me what you wish. Send me to Siberia or wherever you see fit for life, but don't send me to the electric chair;" and that, after he had inquired of a member of the State police whether he had "got to go to the chair," and had been asked in return what he would want done with a man who had shot his mother or sister, he replied, "I would want them to go to the chair. Oh, my poor wife!" such evidence having a bearing on the question of the defendant's sanity and also being in the nature of a confession.

While the rule, that, upon the issue of sanity, a witness having no peculiar skill or personal experience can testify only to facts within his knowledge from which a condition of mind of a certain person may be inferred and is not permitted to state whether in his opinion, although that opinion is derived from personal observation, such person is or is not insane at a certain time, is relaxed when the witness is an attending or family physician, it is the duty of the trial judge to decide in the first instance upon the qualifications as an attending or family physician of a witness offered as such to give an opinion as to a person's sanity, and his decision upon that question is largely a matter of discretion and is conclusive unless from the evidence it appears erroneous in law.

At the trial of an indictment for murder where the defense is insanity and where much evidence has been introduced by the defendant bearing upon his physical condition from early boyhood, a physician, whose opinion, offered by the defendant on the question of his insanity, has been excluded on the ground that he was not a person peculiarly skilled on questions of insanity or an attending or family physician of the defendant, and who, it appears, had examined the defendant in his boyhood as a candidate for a school as to his physical condition at that time, may be asked in cross-examination whether or not in a certificate as

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to such examination he had not answered in the negative the question, "Is the applicant suffering from any disease of the nervous system (chorea, epilepsy, etc.)," and to state that he had so answered and that the answer was true.

At the trial of an indictment for murder where the defense is insanity, persons who are neither physicians nor alienists should not be permitted to testify as to how certain actions of the defendant which they had observed compared with actions of insane persons whom they had seen.

Under R. L. c. 175, § 20, cl. 2, a wife cannot be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against her husband, but the privilege of not testifying is hers and is to be asserted by her only, and if the defendant fails to call her to testify on a matter material to his defense of which she has knowledge, and does not explain his failure to do so, such failure is a proper subject for comment adverse to him in the closing argument for the Commonwealth.

Where at the trial of an indictment for murder the wife of the defendant might have testified as to certain material facts and the defendant did not call her as a witness and offered no explanation of his failure to do so, it is proper for the presiding judge to refuse to rule that "the wife of the defendant is privileged by law from testifying if she desires, and consequently no inference is to be drawn against the defendant because she did not testify, but chose to avail herself of that privilege," because it does not appear that the wife chose to avail herself of her privilege.

At the trial of an indictment for murder where the defendant contends and has introduced evidence tending to show that he was insane when he committed the murder, the jury, in determining whether the Commonwealth has sustained the burden of proving beyond a reasonable doubt that at that time the defendant was sane, should consider, with all the other evidence, the presumption of fact that he was sane at the time.

HAMMOND, J. This was an indictment in two counts for the murder of Martha B. Blackstone on March 31, 1910, in Springfield in the County of Hampden. The indictment was entered in court May 5, 1910, and on the sixteenth of the same month the defendant being arraigned pleaded not guilty. Counsel were assigned to him and the nineteenth day of September then next was set as the time for trial. The crime for which the defendant was indicted was committed in a dwelling house. On the first floor of this house lived Mrs. Dow, an elderly lady, and her two daughters who were school teachers. On the day of the homicide they had invited the deceased to spend the evening with them. She arrived late in the afternoon. After the evening meal, while the four ladies were seated at a table in the parlor solving a picture puzzle, at about eight o'clock, P. M. the defendant who, as the evidence tended to show, had burglariously entered the house through a window, suddenly appeared at the doorway between

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the dining room and the parlor. He wore over a part of his face a black handkerchief as a mask and was armed with a revolver, and he demanded money. He was first seen by one of the daughters, and, as she screamed, all the ladies arose and moved from the back parlor, where they had been sitting, toward the front parlor. The deceased screaming loudly was moving toward the front hall, when the defendant suddenly drew his revolver and shot her through the heart, killing her instantly. Great confusion followed, during which the defendant, after shooting but not mortally wounding one of the daughters, rushed through the front hall and out of the front door.

The defendant, on August 18, moved for a change of venue to the County of Worcester, "for the reason that an impartial trial . . . [could not] be had in the county in which the case . . . [was] . . . pending." This motion was overruled two days later.

On September 15, four months after the plea of not guilty and more than three weeks after the motion for a change of venue had been overruled, the counsel for the defense filed a motion setting forth that the defendant "is now insane, and in such mental condition that his commitment to a hospital for the insane is necessary for his proper care and observation pending the determination of his insanity," and praying therefore that he be committed to a state hospital for the insane "under such limitations as said court may order." After a hearing upon this motion during which there was evidence from "experts in insanity," the defendant was committed, on September 17, to a State hospital, upon conditions to be hereinafter stated. On July 25, 1911, more than ten months after his commitment, the Chief Justice of the Superior Court ordered that he be removed from the hospital to the jail at Springfield, "there to be held in custody in accordance with the terms of the process by which he was originally committed to said jail;" and on August 1 following, the defendant was so transferred. On September 18, 1911, the trial was set down for November 13, 1911.

1. On the day assigned, the defendant, before the jury were impaneled, filed a motion that he be committed to the State hospital for the insane upon the ground that he had not been "legally returned from the State hospital . . . [to] which he was heretofore committed by the order of the court." This motion was overruled and the defendant excepted.

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The defendant was committed to the hospital under St. 1909, c. 504, § 103, which provides that if a defendant in a criminal case is, at or before the time appointed for trial, "found by the court to be insane or in such mental condition that his commitment to a hospital for the insane is necessary for the proper care or observation of such person pending the determination of his insanity, the court may commit him to a state hospital for the insane under such limitations as it may order." It also provides that if a person so removed is in the opinion of the trustees and superintendent of the hospital restored to sanity, he shall be forthwith restored to the jail from which he was removed, to be there held in accordance with the terms of the process by which he was originally committed.

The defendant contends that he could not lawfully be returned except upon a finding by the trustees that he was restored to sanity. It is to be noted that we are not dealing with a case where the grand jury has failed to return an indictment against an accused person solely on the ground of his insanity, nor where a trial jury has for the same reason acquitted a defendant, nor where the defendant for the same reason cannot plead to an indictment. The question before us in no way respects the mental condition of the defendant at the time when he committed the homicide, or was indicted, or entered his plea, nor does it concern the question of his guilt or innocence. It has reference simply to the disposition to be made of him after a general plea of not guilty, and before the trial upon the issues raised by that plea.

In the absence of any statute upon the subject it seems to have been the rule at common law that the prisoner at that stage of his career was held in jail, under the precept by which he was committed, until his trial, or until released by some order of the court. See Archb. Crim. Pr. & Pl. (24th Eng. ed.) 191–193, and cases there cited. And such seems to have been the practice in this Commonwealth before St. 1849, c. 68. This statute provided in substance that if at the time appointed for the trial the court before whom the trial was to be had was satisfied that the defendant was insane, it could authorize such person to be removed to an insane hospital for such term, and under such limitations, as it should direct. And with certain modifications not here material this statute was re-enacted in Gen. Sts. c. 172, § 14; Pub. Sts. c. 214, § 16; R. L. c. 219, § 12. Up to the year 1904, this power

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to commit was limited to cases where the defendant was found by the court to be insane, but in that year it was extended to cases where the defendant is found by two experts in insanity, designated by the court, to be in such mental condition that his committal to an insane hospital is necessary for the proper observation of such person pending the determination of his sanity. St. 1904, c. 257. Then follows St. 1909, c. 504, § 103, the provisions of which have been hereinbefore recited.

Upon the hearing upon the original motion for committal to the hospital the defendant was not found to be insane, but only to be in such mental condition that his committal was necessary for his proper care and observation pending the determination of his insanity; he was committed simply for that purpose, and he was to be there confined until the further order of the court under the proper care and observation of the officers of the hospital who were to make monthly reports to the Chief Justice of the court. Ten months afterwards the Chief Justice ordered that he be returned to the jail at Springfield.

In view of the practice before the St. of 1849, c. 68, and the history of the legislation upon this subject, we are of opinion that St. 1909, c. 504, § 103, was not intended, at least in cases where the person indicted is committed not upon the ground that he is insane but simply for examination pending the determination of his insanity, to delegate solely to the trustees and superintendent the question whether he should longer remain in the hospital, but that where, as in this case, the person indicted has been committed pending the determination of his insanity until the further order of the court, the court upon its own motion can order him to be returned to the jail, and determine for itself the question of insanity upon the reports made by the officers or upon any other competent evidence. The purpose and legal effect of the statute is not to take away from the court the jurisdiction to determine finally the question of the sanity of the defendant, but to provide a place for his care and custody pending the determination of that question.

It appears that the order for the return to the jail was not made until after about ten months from the time of the committal of the defendant to the hospital; and it is to be presumed that the monthly reports of the mental condition of the defendant had

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been sent to the Chief Justice in compliance with the order of committal. The record does not disclose the nature of these reports. Under these circumstances the defendant has no ground of complaint against the order for his return. The fact also that the order for the return is in the form of a letter * and not under the seal of the court is immaterial to the question before us. The defendant had pleaded not guilty to the indictment, he had not been adjudged insane, he properly could be ordered to trial, and he was in court and the court was not bound to go through the ceremony of sending him back to the insane hospital simply that he might be again returned to jail. And that was so even if the order of the Chief Justice was informally communicated to the officer or to the hospital authorities. Moreover the overruling of the defendant's motion was of itself in substance a sufficient order by the court for the appearance of the defendant. The motion was rightly overruled and the defendant, never having been adjudged insane, was thereupon properly before the court for trial.

Upon the record no federal question appears to have been raised at the hearing in the trial court; but even if, as contended by the defendant, he can now raise the question in this court, it is enough to say that in view of the true construction of the statute, and of the nature of the order of committal, which was until the further order of the court, there is no merit in the contention of the defendant that the order for return to this court was in violation of the Fourteenth Amendment to the Federal Constitution.

2. The exception to the overruling of the motion to quash has not been argued on the defendant's brief. There is nothing in it. The case was submitted to the jury only on the first count. Upon an examination of the record it is manifest that the motion was rightly overruled.

3. The next exception relates to the refusal of the trial judge

* This letter was addressed "To the Sheriff of Hampden," was signed by the Chief Justice, and read as follows: "You will forthwith cause Bertram G. Spencer, now under care and observation pending the determination of his insanity at the Bridgewater State Hospital, to be removed therefrom to the jail at Springfield, there to be held in custody in accordance with the terms of the process by which he was originally committed to said jail and this shall be your authority therefor."

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to put certain specific questions to those summoned as jurors.* In reply to the request the judge stated that he intended to instruct the jury that if the defendant was insane at the time of the homicide he was legally irresponsible and it would be the duty of the jury to acquit him; that he should assume that the jury would follow the instruction, and that "if during the progress of the examination [of those called for service as jurors] it appeared that any special question ought to be put to a particular juror, he would feel it his duty to put it, and especially if it seemed that there was any question about the juror being impartial." He then addressed some remarks to those summoned as jurors, in which, in a painstaking and unexceptionable manner, he explained at some length the meaning of the statutory questions which he should put to them. Then, as each proposed juror was called, the judge put to him the statutory questions.† Of the six questions which the defendant had asked to be put, the fourth and fifth were substantially covered by the statutory questions and need not be further considered. The remaining four related to the defense of insanity, and seemed to have proceeded upon the theory that the jurors, or some of them, might entirely ignore that defense. It does not appear that there was any reason to fear such a result or

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* These questions were as follows:

"1. Do you believe in punishing crime if committed by an insane person?

"2. Do you believe that degenerates and insane criminals should be put out of the way, that is, should be put to death?

"3. If you believed that at the time the prisoner committed the crime he was insane within the meaning of the law as declared by the court, would you be willing to acquit him on the ground of insanity?

"4. Do you entertain any feeling of hostility or resentment toward this defendant because of anything you have read or heard in regard to him?

"5. Have you formed or expressed any opinion in regard to the sanity or insanity of the defendant?

"6. Would you acquit the defendant if you believed that at the time of the commission of the act he was dominated by an uncontrollable impulse?"

† The questions which the judge asked of each of those called to serve as jurors were founded on R. L. c. 176, § 28, and were as follows:

"1. Are you related either to the prisoner at the bar or to the deceased?

"2. Have you any interest in the case, or have you formed or expressed any opinion, or are you conscious of any bias or prejudice therein?

"3. Are your opinions such as to preclude you from convicting a defendant of an offense punishable with death?"

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that any competent evidence of any kind was introduced or offered with reference to the proposed jurors or any one of them.

Before the St. of 1887, c. 149, the examination of jurors as to interest, bias etc., beyond the inquiries expressly provided for by the statute, was left to the discretion of the presiding judge. *Commonwealth* v. *Gee*, 6 Cush. 174. *Commonwealth* v. *Burroughs*, 145 Mass. 242. As to the changes made by St. 1887, c. 149, now incorporated into R. L. c. 176, § 28, Holmes, J. in *Commonwealth* v. *Poisson*, 157 Mass. 510, 512, uses the following language: "It would be unfortunate if all control of such an examination should be taken from the court, and we do not interpret the St. of 1887, c. 149, as having that effect. On the contrary, the power given by the St. of 1887 to the parties to make the examination provided for by the Public Statutes is, in terms, to make it 'under the direction of the court.' There is still a discretion, and, in our opinion, it is exercised wisely by not going beyond the usual questions, unless something appears which makes it proper to go further." Under this law as thus laid down we are of opinion that the matter of putting the questions was within the discretion of the court, and that upon the record it was exercised rightly.

4. Miss Harriet Dow, one of the four ladies in the parlor at and before the time of the homicide, testified that they were in the parlor working "away at the puzzle," and that she remembered that the clock struck eight. She was allowed against the exception of the defendant to state that when the clock struck eight the deceased made a remark. The witness was not allowed to state what the remark was. For aught that appears it was of such a character as by association to impress vividly upon the mind of the witness the fact that the clock had struck eight and thus to fix the time. But whether that be so or not, there was evidence that at that very time the defendant was in the house engaged in his nefarious undertaking, and it is certainly not erroneous to show that as he was stealthily approaching his victim she was conscious and was engaging in conversation.

5. At the trial the main defense was insanity, and on that issue much evidence was introduced as to the character and conduct of the defendant ever since his early boyhood. The fifth and sixth exceptions are to the admission in evidence of certain statements

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made by the defendant after his arrest.* These statements were plainly admissible as tending to show his realization of the nature of the crime and thus having a bearing upon the question of his sanity, and also as in the nature of a confession that that crime had been committed by him.

6. The exceptions to the exclusion of the witnesses Danielson and La Motte, as qualified to give their opinion on the question of the sanity of the defendant, are not tenable. Whatever may be the practice elsewhere, it has long been settled in this State that, with the exception of the subscribing witnesses to a will, persons "having no peculiar skill or professional experience, can testify only to facts within their own knowledge, from which the condition of mind may be inferred, and are not permitted to state whether in their opinion, though derived from personal observation, a certain person was sane or insane at a particular time." Gray, J. in *Hastings* v. *Rider*, 99 Mass. 622, 624. As to attending or family physicians, the rule is somewhat relaxed. It is the duty of such a physician to make himself acquainted with the peculiarities, bodily and mental, of his patient, and he has the experience resulting from the performance of such duty. He therefore is permitted to testify from his own observation to the patient's mental capacity. The law in this Commonwealth on this point is so well settled, and has been so many times applied, that it is unnecessary to discuss it here. For a statement of the basis upon which it rests and for the manner in which it has been applied, see among other cases *Hastings* v. *Rider*, *ubi supra*, and cases therein cited. *Clark* v. *Clark*, 168 Mass. 523, and cases cited. *Commonwealth* v. *Rich*, 14 Gray, 335. See also *Goodwin's trial*, (1885) page 295.

But such a physician comes under the rule as to experts, and

* The first of these statements was to John H. Boyle, captain of police of Springfield, who testified that while he was riding in the patrol wagon with the defendant on the way to jail the defendant said to him, "Do with me what you wish. Send me to Siberia or wherever you see fit for life, but don't send me to the electric chair." One Fred F. Flynn, a member of the district police, testified as to the other statement as follows: "Later on I talked to him and he said, 'Mr. Flynn, what is to become of me? Have I got to go to the chair?' I said, 'Mr. Spencer, I don't know what the jury will do with you. What would you want done with a man who would shoot your mother or sister when they had done no one no harm?' He said, 'I would want them to go to the chair. Oh, my poor wife!'"

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when he is offered as a witness it is the duty of the presiding judge to decide upon his qualifications as such physician in the first instance. And while there may be cases where his decision upon that question is plainly erroneous and for that reason must be reversed (*Muskeget Island Club* v. *Nantucket*, 185 Mass. 303), yet the matter is largely within the discretion of the judge and his decision, being one of fact, is conclusive unless upon the evidence it appears erroneous in law. *Perkins* v. *Stickney*, 132 Mass. 217. *Muskeget Island Club* v. *Nantucket, ubi supra*. *Lawrence* v. *Methuen*, 187 Mass. 592. In the present case considerable evidence as to the respective qualifications of the witnesses Danielson and La Motte was introduced. It is unnecessary to recite it in detail. It is sufficient to say that it cannot be said as matter of law that it did not warrant the conclusion reached by the court as to each of them.

7. Upon the cross-examination of Danielson it appeared that he had once examined the defendant as a candidate for admission to the Mount Hermon school as to his physical condition at that time; that certain interrogatories were upon a paper, and that the results were stated in written answers to these, all in the general form of a certificate signed by the witness. He testified without objection on the part of the defendant as to many of these answers and that they were true. Finally he was asked whether in answer to the interrogatory: "Is the applicant suffering from any disease of the nervous system (chorea, epilepsy, etc.)," he answered "No." Against the strenuous objection of the defendant he was allowed to say that he did so answer and further that the answer was true.

It is now contended in behalf of the defendant that this was an expression of opinion by the witness as to the sanity of the defendant, and that, since the court had rejected him as a witness for the defendant on that issue, the answer was inadmissible. But it clearly appears from the record that the evidence was not admitted upon the question of the mental condition of the defendant, but simply on his physical condition. The result of the two questions was to get from the witness his present idea of the physical condition of the defendant at the time the certificate was given. Much evidence was introduced by the defendant bearing upon his physical condition from his early boyhood, and to meet that, this was clearly admissible.

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8. The questions put to the witnesses Bailey and Carpenter * as to how the actions of the defendant compared with those of the insane people which they had seen were properly excluded. The only thing these witnesses could do was to describe the appearance of the defendant so that the jury might see, so far as possible, what they saw, but it is manifest that the jury could not be helped in thus seeing by any comparison of such appearance with the conduct of persons whom, although insane, the jury never had seen. It is unnecessary to name other obvious objections to the admissibility of the evidence.

9. Dr. Briggs, an alienist called by the defendant, after having testified that in his opinion the defendant was insane, stated on cross-examination that he had made two examinations of him; that during one of the examinations the defendant made several statements; that among them was one to the effect that he "found himself at the throat of his child twice and had been torn away by his wife before he realized what he was doing; that he remembered hearing the child scream and remembered nothing else until the wife took him away from the child." The witness further stated that he believed this statement to be true, and that he considered it, and that it was one of the things that had an effect upon his mind in reaching his conclusion. He also testified to other statements made to him by the defendant. During the trial the defendant's wife was sitting beside him and administering to his needs. She was not called to the witness stand either by him or by the Commonwealth.

During the closing argument for the prosecution, the Attorney General, upon the question of insanity, alluding especially to the opinion of Dr. Briggs, called attention to the fact that there was no evidence that the defendant's statements concerning his attacks upon his child, which the doctor had assumed to be true, were in fact true. And in this connection the Attorney General said that the person "who could tell . . . more about this defendant than any [other] living person" was the defendant's wife. He commented in a manner unfavorable to the defendant upon his failure to call his wife as a witness not only to the matter of the attacks upon the child, but to the general question of the defendant's

* Neither of these witnesses was a physician or an alienist.

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sanity so far as she could testify as to his acts bearing on that issue. The defendant did not call the attention of the court to those remarks at the time they were made nor object to this line of argument.

Before the charge to the jury the defendant asked the judge to rule that "the wife of the defendant is privileged by law from testifying if she desires, and consequently no inference is to be drawn against the defendant because she did not testify, but chose to avail herself of that privilege." The judge refused to give this instruction and the defendant excepted. During the charge the judge stated that the defendant had the right to testify but that if he declined to do so, that circumstance must not to any extent whatever be taken against the defendant; but he gave no instructions with reference to the failure of the defendant to call his wife. At the close of the charge the defendant, while taking an exception to another portion of the charge, made no complaint of the omission in the charge of any instructions as to the wife's failure to testify, nor did he ask the judge to say anything on that subject. After the refusal of the judge to give the ruling the defendant in no way seems to have mentioned the subject again, but to have relied entirely upon his exception to the refusal to give the ruling as requested. The sole question therefore is whether there was error in the refusal.

At common law, with certain exceptions not here material, neither husband nor wife was a competent witness in any action or proceeding, civil or criminal, to which the other was a party. This rule has been quite generally modified in England and in the States of this Union. There is considerable difference in these various statutes, resulting in a diversity of practice. In this Commonwealth it was provided by St. 1870, c. 393, § 1, that any person of sufficient understanding might testify, providing, however, that "neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other." And such has been our law ever since. Pub. Sts. c. 169, § 18, cl. 2. R. L. c. 175, § 20, cl. 2. By the same statute it is provided that the defendant in a criminal proceeding may testify for himself, but his failure to testify shall not be taken against him. The result of our statutory provisions is that a party to a legal proceeding, either civil or criminal, may testify or may

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call any person of sufficient understanding as a witness, except that neither husband nor wife shall be compelled to testify against the other in a criminal case, nor in any case shall be allowed to testify as to private conversations with each other. *Commonwealth* v. *Barker*, 185 Mass. 324. It is well to note the difference as to the various kinds of testimony with which the statute deals. As to private conversations with each other, neither husband nor wife is allowed to testify, no matter how much the testimony is desired by either of them or by any third party. As to their testimony against each other either may testify, but shall not be compelled so to do in a criminal proceeding against the other. The privilege is that of the spouse called and not of the defendant. In the case of the defendant in a criminal suit the question whether he will testify is decided by him alone. In only this last case is his failure to produce the evidence not to be taken against him. In all other proceedings and as to all witnesses except himself in a criminal proceeding against him, the defendant is left to the general principles of law as to what inference may be drawn against him for his failure to produce evidence in his favor. In this respect our statute differs from those of some States which expressly provide that the failure of one spouse to produce the other shall not in a criminal case be taken against the defendant. See for instance Rev. Sts. of Mo. 1909, § 5243; *State* v. *Weaver*, 165 Mo. 1; *State* v. *Taylor*, 57 W. Va. 228. See also Wigmore on Ev. § 488 (n).

One of these general principles is that, where the circumstances are strong against the defendant and it becomes a question what weight shall be given to them in view of any conceivable explanation of them, if there be witnesses who could furnish any such explanation and they are peculiarly under the influence of the defendant or peculiarly related in interest to him, then his failure to produce any such witness is a proper subject for comment unfavorable to him. *Commonwealth* v. *Webster*, 5 Cush, 295, 316. *Commonwealth* v. *Finnerty*, 148 Mass. 162. A failure to explain what can be reasonably explained may be taken as evidence that the truth would not help the defendant. The jury are to judge whether the defendant has done what he could to put the evidence before them and what weight should be given to his failure. There can be no doubt in the present case that the failure of the defendant to produce his wife is within the rule, unless it is excluded by the

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fact that if called she might have refused to testify. *Commonwealth* v. *Galligan*, 156 Mass. 270.

The defendant always may relieve himself from any unfavorable inference by showing that by reason of the sickness or absence of the desired witness or from any other cause he has been unable to produce him; but he is to be held to reasonable effort to produce the witness, and in the absence of any evidence of such effort the rule applies. In the present case the wife was in court during the whole or a part of the trial, and ministered to the wants of the defendant. Apparently he had ample time to converse with her. Whether or not she, if called, would testify was a matter entirely personal to her. The privilege to refuse was hers, not his. If he had called her and she had refused to testify, then no inference could have been drawn against him. It then would have appeared that he had done all he could do to call her and avail himself of her evidence. But he did not call her. It does not appear that she refused to take the stand, or that the defendant had made any attempt whatever to get her testimony. This is not a case where the defendant has the right to introduce evidence under a law saying that the failure to produce it shall not be taken against him, as in the case of his own right to testify, but is a case where the witness is competent, and, if called, may testify or not as she pleases; and there is nothing to show her unwillingness. Her failure to testify is as consistent with the theory that he did not desire her to testify as with the theory that she was unwilling so to do. It cannot be assumed in his favor that her absence from the witness stand was due to her refusal to testify. If he desired to be relieved from the operation of the rule as to the production of his wife as a witness he should have shown that he had made an effort to that end. So far as respects our statute, the rule that the defendant should make reasonable effort to explain by the aid of witnesses peculiarly related to him is as applicable when the wife is the needed witness as where any other person is. *Commonwealth* v. *Galligan, ubi supra.*

The ruling requested could not have been given as a whole. It assumed the existence of something which had not appeared as a fact, namely, the choice of the wife to avail herself of the statutory privilege not to testify. The defendant, as heretofore has been said, made no further attempt to call the attention of the

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presiding judge to the matter, either by an exception to the charge or by a request for some instructions as to the right of the wife to refuse to testify, but rested his case so far as this subject was concerned upon his exception to the refusal to give the ruling requested. There was no error in law in this refusal; and under the circumstances there is no ground for a new trial based upon the action of the court on this branch of the case.

The defendant has called our attention to some decisions in other States, and we have examined many others. Some of these decisions are based upon statutes differing in language from ours, and for that reason have but little, if any, bearing upon the construction to be given to our statute; but however that may be, even if there be anything in them inconsistent with the conclusion to which we have come, we cannot follow them.

10. The defendant excepted to so much of the charge as permitted the jury to take into account the presumption of sanity after evidence was introduced of the defendant's insanity. The rule on this subject is thus stated by Knowlton, C. J., in *Clifford* v. *Taylor*, 204 Mass. 358, 361 (which was a will case) in this language: "The true rule is that the presumption is enough to sustain the burden of proof, until evidence is introduced which tends to control it. On the introduction of such evidence, the case is to be determined upon the whole evidence, including the presumption of sanity, and if the preponderance of the evidence is in favor of sanity, the burden of proof is sustained and the jury will find for the executor. If, upon the whole evidence, including this presumption, the scales are in even balance, the finding will be for the contestant, on the ground that the executor has failed to sustain the burden of proof." The rule is the same in a criminal case except that the proof required is beyond a reasonable doubt. The presumption which is at first in one of the scales is not removed from its place merely because something is put in the other. It still remains where it was first placed, and to the end plays its proper part in helping to tip that scale down. The charge of the court on this branch of the case was in accordance with this principle, and was full, apt and correct.

Exceptions overruled.

R. P. Stapleton, for the defendant.

C. T. Callahan, District Attorney, for the Commonwealth.

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GEORGE T. GAMMONS, executor, *vs.* JESSIE I. GAMMONS.

Worcester. May 21, 1912. — June 24, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Devise and Legacy, Rights of adopted child. *Adoption.*

Under a will which contains certain bequests to a son of the testator and makes no mention of a child or issue of the son, an adopted child of the son takes nothing if the son dies before the testator.

SHELDON, J. The respondent Jessie Inman Gammons was legally adopted in 1894, by Henry A. Inman and his wife. Sanford A. Inman, by his will dated in 1902, made certain bequests to Henry A. Inman, who was one of his sons. Henry A. Inman died before the testator, leaving no issue of his body, but only this adopted daughter. She claims to be entitled to receive what was thus bequeathed to her adopting father, under R. L. c. 135, § 21.

As the adopted child of the deceased son of the testator, claiming under a bequest which now could be taken only by the issue of that son, her claim cannot be supported under the provisions of R. L. c. 154, § 7, because it is only as to her adopting parents and their legal descendants that she has acquired the rights of a child born to those parents in lawful wedlock. *Buckley* v. *Frasier*, 153 Mass. 525. *Wyeth* v. *Stone*, 144 Mass. 441. *Blodgett* v. *Stowell*, 189 Mass. 142. *Brown* v. *Wright*, 194 Mass. 540. There being no provision for her in the will of the testator, who was not her adopting parent, her rights are governed by R. L. c. 154, § 8. That section provides that "The word 'child,' or its equivalent, in a grant, trust-settlement, entail, devise or bequest shall include a child adopted by the settlor, grantor or testator, unless the contrary plainly appears by the terms of the instrument; but if the settlor, grantor or testator is not himself the adopting parent, the child by adoption shall not have, under such instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settlor, grantor or testator to include an adopted child."

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But Jessie Inman Gammons can take nothing under this section, whatever may have been the unexpressed intention of the testator, because she does not come within its terms. The will of Sanford A. Inman does not contain the word "child" or any equivalent thereof, in the bequests to Henry A. Inman. There is absolutely no reference to any child, issue, or descendants of Henry in that will. The provisions of R. L. c. 135, § 21, do not make up for this omission, for under the decisions already referred to and the express language of R. L. c. 154, § 7, she cannot take by representation as the "issue" of her adopting parent. This is expressly stated in *Wyeth* v. *Stone*, *ubi supra*. It follows that she takes nothing under the will of Sanford A. Inman; and we need not consider whether under the latter part of § 8, above quoted, if the testator had made a limitation to the children, issue or descendants of his son Henry, parol evidence of the declarations of the testator would have been competent and sufficient to make it plainly appear that it was his intention to include in such a limitation the adopted daughter of that son.

As no other question is raised by the appeal, the decree of the Probate Court must be affirmed; and it is

So ordered.

The case was submitted on briefs.

C. Steere, for the executor.

W. B. Grant, for Jessie I. Gammons.

W. E. Sibley, *C. H. Sibley & C. M. Blair*, for Caroline V. Carpenter and others.

OSCAR N. BINGHAM *vs.* JOHN O. MONROE & another.

Suffolk. May 20, 1912. — June 27, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Seaman. *Agency*, Existence of relation. *Contract*, Implied in law. *Practice, Civil*, Exceptions, Parties, New trial.

At the trial of an action by a seaman against the owner of a vessel for wages, it appeared that the plaintiff was hired by the master of the ship and the master testified that he orally hired the vessel from the owner. The terms of the

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hiring of the vessel were not offered in evidence and the owner did not testify. The jury found for the plaintiff and the defendant alleged exceptions. The bill of exceptions contained no part of the charge to the jury. *Held*, that, since if the master had hired the vessel he could not have been found to have had authority as agent to bind the owner in engaging the plaintiff and presumably the jury were so instructed, their finding for the plaintiff must have meant that they found that there was no hiring of the vessel by the master.

A seaman who was hired by the master of an unchartered vessel may maintain an action for his wages against either the owner or the master; but he cannot maintain an action against both of them, because the liability of the owner is based upon an implied authority of the master to contract on his behalf, and the bringing of an action against the master is an election to treat him and not the owner as the principal.

If the master of an unchartered ship, in making an express contract of hire with a seaman for a voyage from Boston, represents that he is going to take the seaman on a voyage to Maine, and instead takes him without his consent on a voyage to the South, such deviation from the voyage agreed upon puts an end to the express contract and entitles the seaman to recover his wages from either the owner or the master on a *quantum meruit*.

If the master of an unchartered ship makes an express contract of hire with a seaman for a fishing trip to the coast of Maine and then without the consent of the seaman takes him on a voyage to the South for an illegal purpose of which the seaman did not know and in which he did not participate, the seaman can recover for his services either from the master or from the owner of the ship on a *quantum meruit*.

At the trial of an action by a seaman for his wages the plaintiff improperly joined as defendants both the master and the owner of the ship. There was evidence warranting a verdict against either of the defendants. The defendants did not ask the judge to rule that both of them could not be held liable. There was a verdict for the plaintiff against both defendants. In sustaining exceptions by the defendants, the plaintiff was given an opportunity with leave of the Superior Court to discontinue against one of the defendants, in which case the exceptions were to be overruled.

CONTRACT upon an account annexed for wages as a seaman, the master of the ship, John O. Monroe, and its owner, Charles J. Porter, being joined as defendants. Writ dated September 14, 1910.

In the Superior Court the case was tried before *Lawton*, J. Material facts which might have been found upon the evidence are stated in the opinion. At the close of the evidence the judge at the request of the plaintiff ruled as follows:

"1. If the defendant Monroe represented to the plaintiff that they were going on a certain voyage, and then the plaintiff was taken on a different voyage without his consent, he can recover.

"2. If the defendant Monroe took the plaintiff on an illegal

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enterprise without the knowledge and consent of the plaintiff, he can recover.

"3. The owner of a vessel, as well as the captain is liable for wages of a seaman.

"4. In estimating the amount the plaintiff is entitled to recover, the jury can take into consideration the hardship and danger connected with the work he was required to do."

After the charge the defendants orally requested the judge to rule, under the first and second rulings asked for by the plaintiff, that the jury might take into consideration the opportunities the plaintiff had of leaving the vessel, and his failure to do so. The judge refused so to rule.

The jury found for the plaintiff in the sum of $81.75, against both defendants; and the defendants alleged exceptions.

The case was submitted on briefs.

C. W. Cushing, for the defendants.

F. S. Harlow, for the plaintiff.

DeCourcy, J. The plaintiff was a seaman (U. S. Rev. Sts. § 4612), and had a three-fold remedy for the recovery of his wages. In the admiralty he could proceed against the master, the owner, or the ship; and at common law against either the owner or the shipmaster. *Temple* v. *Turner*, 123 Mass. 125. *Calvin* v. *Huntley*, 178 Mass. 29.

It is true, as contended by the owner, Porter, that if the shipmaster Monroe had chartered the vessel he became the owner *pro hac vice* and had no authority as agent to bind the general owner for wages. *Thompson* v. *Hamilton*, 12 Pick. 425. *Baker* v. *Huckins*, 5 Gray, 596. *Rich* v. *Jordan*, 164 Mass. 127. As the jury presumably were so instructed, the fact that they found against the owner indicates that they did not credit the testimony of Monroe that he had chartered the vessel. Admittedly there was no charter-party, the terms of the alleged parol agreement were not offered in evidence, and the owner Porter was not a witness. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

The plaintiff, however, cannot maintain his action against both the owner and the master. The owner's liability is based upon the implied authority which the master has to contract on behalf of the owner. If the plaintiff sees fit to treat the master as the princi-

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pal, the remedy is against him alone. The third request should have been qualified accordingly. *Priestly* v. *Fernie*, 3 H. & C. 977. *Fitzsimmons* v. *Baxter*, 3 Daly, (N. Y.) 81.

The first ruling requested by the plaintiff was properly given. According to his testimony he was hired to go to the coast of Maine on a lobster fishing trip. Instead the master headed the schooner south, touched at Newport News and Old Point Comfort, and after reaching Cape Hatteras returned to Boston. Such a deviation from the voyage put an end to the express contract for wages and entitled the plaintiff to recover on a *quantum meruit*. *Coffin* v. *Newburyport Marine Ins. Co.* 9 Mass. 436, 448. The plaintiff makes no contention with reference to wages under the statutes of the United States based on the absence of shipping articles, nor is any question raised as to the amount due if the plaintiff is entitled to a verdict.

The second ruling requested was correct. The master Monroe testified that his purpose was to go to Mexico for Chinamen whom he intended to bring into the United States illegally. But it appeared from the testimony of all the witnesses that the plaintiff did not know of the illegal character of the voyage until after his return to Boston and that he was innocent of any participation in the wrong. *Sheppard* v. *Taylor*, 5 Pet. 675. *The Mary Ann*, 16 Fed. Cas. 9194. *The City of Mexico*, 28 Fed. Rep. 207.

No error is suggested in the fourth request, and we discover none. Nor do the defendants show that they were aggrieved by the failure to instruct the jury in accordance with the requests made orally after the charge. It is not clear how the plaintiff's opportunities to leave the vessel bear upon the second request; and in view of the plaintiff's testimony that he was without money and that his clothing was in a ragged condition, if the defendants desired any particular instruction on the first request based upon the plaintiff's failure to leave the vessel, they should have so requested in writing before the closing arguments, in compliance with the rule of court. The judge's charge is not printed in the record, but as no exceptions were taken thereto, presumably suitable instructions were given to the jury upon every issue.

As already stated, the plaintiff's third request should have been modified and the jury instructed that recovery could be had against the owner or the master, but not against both. As there was evi-

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dence, however, warranting a verdict against either of them, and the defendants did not ask the judge to rule that both could not be held liable, the plaintiff should not be compelled to re-try his case. Accordingly if, within twenty days, the plaintiff shall be granted leave by the Superior Court, and shall discontinue against one of the defendants the entry is to be made. Exceptions overruled; otherwise the exceptions must be sustained.

So ordered.

THEODORE W. STONE, receiver, *vs.* OLD COLONY STREET RAILWAY COMPANY.

Suffolk. March 20, 1912. — June 29, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Insurance. Conflict of Laws. Statute, Construction. *Set-off. Damages,* Recoupment.

Where a street railway corporation incorporated and doing business in this Commonwealth, desiring to procure insurance against liability for accidents, signs a printed form of application and mails it to the home office of an insurance company, organized and doing business in another State, and there the application is accepted and a policy payable at the home office is signed and issued and is deposited in the mail addressed to the railway corporation, the contract of insurance is made and to be performed in the home State of the insurance company, and is not illegal because that company has not complied with the requirements of our statutes in regard to foreign insurance companies doing business in this Commonwealth. And *it seems* that the contract is none the less made in such other State, if the secretary of the foreign insurance company, when temporarily in this Commonwealth, without any intention to do insurance business here, solicits and receives the application for such insurance and takes it to the home office of the insurance company where it is acted on.

The provision of St. 1894, c. 522, § 3, now contained in St. 1907, c. 576, § 3, that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," is not to be interpreted as attempting to regulate or prohibit contracts made in other jurisdictions or to deprive a citizen of this Commonwealth of the right to protect himself from loss through a contract of insurance made in another State.

An action of contract for the collection of assessments imposed by an order of a court of another State on the holders of policies in an insolvent mutual insurance corporation organized under the laws of that State, under a provision in the policies which would not be valid in a Massachusetts policy, may be maintained by the receiver of the property of the corporation in the courts of this

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Commonwealth, when the contracts of insurance were made and were to be performed in such other State and there are valid.

In an action of contract by the receiver of the property of an insolvent mutual insurance corporation organized in another State, to collect an assessment decreed to be due by the order of a court of that State assessing the policy holders under the terms of a contract of insurance made in that State and there valid, which is held to be enforceable in the courts of this Commonwealth, the defendant can have no right of set-off or recoupment for the amount of his accrued claims under his policies, because this would give him a preference over other creditors and policy holders of the insolvent insurance company.

CONTRACT by the receiver of the property of the Electric Mutual Casualty Association, an insolvent Pennsylvania corporation, to recover the amount of assessments levied by a decree of the Court of Common Pleas of Dauphin County, in the State of Pennsylvania, upon certain Massachusetts street railway companies as holders of policies in the insolvent corporation insuring against liability for accidents, the defendant being the successor by consolidation of the corporations upon which the assessments in question were levied. The amount claimed was $12,463.24 with interest from August 10, 1903. Writ dated September 24, 1908.

The original declaration was upon a judgment alleged to have been obtained in the Pennsylvania court. An amended declaration, stating the plaintiff's claim as above, was filed on March 2, 1911.

In the Superior Court the case was submitted to *Bell*, J., upon an agreed statement of facts. The essential facts are stated in substance in the opinion.

The rulings requested by the defendant, which are referred to in the opinion as having been refused properly by the judge, were as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. There is no evidence to warrant a finding for the plaintiff."

"7. Under the provisions of § 3 of St. 1894, c. 522, the contracts of insurance entered into beween The Electric Mutual Casualty Association and the Massachusetts street railway companies must be deemed to be made in Massachusetts.

"8. The insurance policies issued by The Electric Mutual Casualty Association to the defendant did not become operative or binding until their receipt by the defendant in Massachusetts and are, therefore, contracts made in Massachusetts."

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"10. In soliciting the applications for, and in the execution of, the insurance policies, The Electric Mutual Casualty Association violated the provisions of sections 78 and 84 of St. 1894, c. 522, and the policies and any liability created thereby are unenforceable in this Commonwealth.

"11. The consideration for the promise of the insured to pay premiums and assessments, upon which promise this action is founded, was a contract by an insurance company which it was prohibited from making by the laws of this Commonwealth.

"12. There was no lawful consideration for the promises of the insured to pay premiums and assessments.

"13. The promises of the insured to pay premiums and assessments were without lawful consideration and are not in law binding agreements."

"16. If the contracts for insurance were agreed upon, and the terms of the policies and amounts of the premiums fixed, orally in Massachusetts the contracts of insurance are unlawful and void no matter where the policies may have been signed and delivered."

The judge found for the plaintiff in the sum of $18,507.92 and found for the defendant on the declaration in set-off in the sum of $1,595.54, being the amounts stated in the agreed facts with interest added to each from August 10, 1903, the date of demand after the decree of the Pennsylvania court.

The judge reported the case for determination by this court. If his rulings of law, his exclusion of evidence, and refusals to rule were correct, and if his findings of fact were warranted by the evidence, judgment was to be entered in accordance with his findings; otherwise, there was to be such entry as in the opinion of this court law and justice required.

G. W. Cox & G. Murchie, for the plaintiff.

A. A. Ballantine, for the defendant.

BRALEY, J. The defendant by purchase and consolidation has succeeded to the rights and liabilities of a number of street railway companies which held assessable policies of indemnity or accident insurance in the Electric Mutual Casualty Association, a corporation chartered by the Commonwealth of Pennsylvania. By the terms of the contract, whenever the fixed premiums were insufficient to pay matured claims, the directors were empowered to charge a proportional additional sum, not exceeding five per centum

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on the gross traffic receipts of the assured, to cover the deficiency. The association having become financially unable to do business, it was adjudicated insolvent by a court of its domicil having full jurisdiction, and the plaintiff was appointed receiver. Upon his report of assets and liabilities a further decree was entered, levying proportional assessments on the policy holders sufficient in amount for the payment of accrued liabilities, and authorizing him if necessary to enforce collection by suit not only within the jurisdiction of the tribunal appointing him, but wherever legal proceedings might be necessary. It is in pursuance of these decrees, that the present action has been brought to collect from the defendant the combined amount of the assessments due from the policy holders of which it is comprised. The proceedings were before a court having jurisdiction of the association, and while the defendant was not a party, and there is no personal judgment by which it is bound, the authority of the plaintiff to enforce the defendant's contractual liability and the amount recoverable are not open to collateral attack. *Howarth* v. *Lombard*, 175 Mass. 570, 579. *Converse* v. *Ayer*, 197 Mass. 443. *American Spirits Manuf. Co.* v. *Eldredge*, 209 Mass. 590, 597. *Converse* v. *Hamilton*, 224 U. S. 243. Indeed the defendant conceded this, and the trial judge correctly ruled, that the plaintiff had not obtained judgment, and the finding distinctly rests on the amended declaration.

But the contractual relations of the policy holders and the association were unchanged by the receivership, and the defendant is not precluded from contesting its liability. *Hayward* v. *Leeson*, 176 Mass. 310. *Capital City Mutual Fire Ins. Co.* v. *Boggs*, 172 Penn. St. 91. The association not having complied with the St. of 1894, c. 522, §§ 77, 78, 79, by procuring from the insurance commissioner authority to issue policies and make contracts of insurance within this Commonwealth, it is contended under § 3, that the policies were unlawfully issued. The agreed facts regarding the negotiations, and formation of the contracts, are full and definite. A railway company desiring insurance signed the printed form of application furnished by the association and mailed it to the home office in Philadelphia where upon acceptance the policies were signed, issued and deposited in the mail properly addressed to the applicant. The judge having been warranted in finding, that the policies in suit were thus procured, the contracts were completed,

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and were to be performed * in Pennsylvania. *Milliken* v. *Pratt*, 125 Mass. 374. *Brauer* v. *Shaw*, 168 Mass. 198. *Perry* v. *Mount Hope Iron Co.* 15 R. I. 380, 381. *Commonwealth Mutual Fire Ins. Co.* v. *William Knabe & Co. Manuf. Co.* 171 Mass. 265. *Stone* v. *Penn Yan, Keuka Park & Branchport Railway*, 197 N. Y. 279. *United States* v. *Thayer*, 209 U. S. 39, 43. See *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89, 95. And the defendant had the burden of proving that they were illegal. *Abraham* v. *Reserve Fund Life Association*, 183 Mass. 116, 119.

But if in making the attempt the testimony of its witness, who had acted as counsel for the insured companies and of the association, that in some instances the association's secretary had personally solicited and received applications, and taken them to the home office, was not privileged under the decision in *Thompson* v. *Cashman*, 181 Mass. 36, and should not have been excluded; the defendant is not shown to have been prejudiced. It did not appear from his very indefinite statements, that any of the policies in question had been issued on applications received by the secretary while in this Commonwealth. If, however, this evidence can be considered as susceptible of the inference the defendant urges, nothing appears indicative of any purpose of the witness, or of those with whom he advised, to evade the statute. The judge unhesitatingly decided, that in all the transactions there had been no intention on the part of the association to engage in any acts in violation of our laws, and it "did not do any acts in this State on the theory that it was entitled to do insurance business here," and the defendant does not contend that the finding is unsupported by the evidence. It being manifest that, whatever mode of receiving the applications may have been employed, the applications were finally acted upon, and the contracts were actually delivered in another State where they are conceded by the defendant not to have been illegal, the defendant's first, second, seventh, eighth, tenth, eleventh, twelfth, thirteenth and sixteenth requests could not properly have been given. *M'Intyre* v. *Parks*, 3 Met. 207. *Finch* v. *Mansfield*, 97 Mass. 89. *Graves* v. *Johnson*, 179 Mass. 53. *Reliance Mutual Ins. Co.* v. *Sawyer*, 160 Mass. 413.

* The policies were payable on receipt of satisfactory proof of loss at the home office.

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Commonwealth Mutual Fire Ins. Co. v. *Fairbank Canning Co.* 173 Mass. 161, 164.

It is further contended, that our courts should not lend their aid for the collection of the assessments. No express legislative prohibition however is found, and the concluding sentence in § 3 of c. 522 of the St. of 1894, that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," should not be construed by implication as intended to regulate or prohibit contracts of insurance made in other jurisdictions. *Johnson* v. *Mutual Life Ins. Co. of New York,* 180 Mass. 407, 409. It is settled, that while an insurance broker who in violation of § 98 solicits insurance in foreign companies which have not been licensed by the insurance commissioner may be prosecuted criminally, State legislation cannot deprive a citizen of the personal right to protect himself from loss, through insurance obtained on his property under a contract made outside of the State of his domicil. *Commonwealth* v. *Nutting,* 175 Mass. 154. *Nutting* v. *Massachusetts,* 183 U. S. 553. *Pierce* v. *People,* 106 Ill. 11. *Allgeyer* v. *Louisiana,* 165 U. S. 578. *Delamater* v. *South Dakota,* 205 U. S. 93, 102. The general rule, where enforcement of a foreign contract is sought against a party in the courts of his residence, has been stated in these words: "If it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. *Scudder* v. *Union National Bank,* 91 U. S. 406. Even a contract expressly prohibited by the statutes of the State in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a State the laws of which permit it." *Milliken* v. *Pratt,* 125 Mass. 374, 375. A contract of indemnity against loss from casualties arising from the operation of a street railway is not detrimental to fundamental public interests, or repugnant to justice. It is not tainted with illegality, as the plaintiff is not compelled to prove an unlawful act in order to maintain the action. *Bourne* v. *Whitman,* 209 Mass. 155. The amount when recovered will constitute assets for the liquidation of the liabilities of the insolvent, and no rights of domestic creditors are impaired. Contracts creating preferential assignments where

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some of the creditors are to be paid in full, and relieving common carriers from the results of their own negligence, having been valid where made, have been enforced, although such provisions are not allowed here. *Train* v. *Kendall*, 137 Mass. 366. *Frank* v. *Bobbitt*, 155 Mass. 112. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553, 557. *O'Regan* v. *Cunard Steamship Co.* 160 Mass. 356, 361. And actions grounded on transactions forbidden by our laws, also have been sustained to recover the price of a cargo of slaves, and of lottery tickets, sold where such sales were recognized as valid. *Greenwood* v. *Curtis*, 6 Mass. 358. See *Commonwealth* v. *Aves*, 18 Pick. 193, 215; *M'Intyre* v. *Parks*, 3 Met. 207. It would be unfortunate if relief were denied where the defendant, having received the protection conferred by the insurance, seeks to escape from the burden mutually assumed with other members, and there is no imperative reason of public policy why the plaintiff under interstate comity should not be aided and permitted to recover. In the enforcement in our courts of a foreign law differing from our own, or of a foreign contract where the rights of our citizens would not be denied or unjustly prejudiced, this principle has been fully recognized in the recent decisions of *Walsh* v. *New York & New England Railroad Co.* 160 Mass. 571; *Howarth* v. *Lombard*, 175 Mass. 570; *Putnam* v. *Misochi*, 189 Mass. 421, 423; *Converse* v. *Ayer*, 197 Mass. 443; *Walsh* v. *Boston & Maine Railroad*, 201 Mass. 527, and *American Spirits Manuf. Co.* v. *Eldredge*, 209 Mass. 590, 597. The circumstances of the present case are insufficient on which to ground an exception.

It is unnecessary to review requests which although refused have not been argued, and finding no error in the refusal to give the remaining requests, that the action could not be maintained for the reasons assigned, the allowance of the defendant's claim in set-off or in recoupment, against the objection and exception of the plaintiff, is the only question left for determination. The right of the defendant to declare in set-off or to plead in recoupment being a remedial right, it is governed by our laws where the remedy is furnished. *Blanchard* v. *Russell*, 13 Mass. 1, 5. *Bulger* v. *Roche*, 11 Pick. 35, 37. *Carver* v. *Adams*, 38 Vt. 500. *Pritchard* v. *Norton*, 106 U. S. 124, 133. The remedy of set-off being unknown to the common law is given exclusively by statute, which does not include claims or demands not within its provisions.

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Stowers v. *Barnard*, 15 Pick. 221, 223. 34 Cyc. 626, n. 18. If the association while solvent had levied the assessment and brought suit, the defendant would have had a cross demand for the amount of its accrued claims under the policies which although liquidated had not been paid. R. L. c. 174, § 1. And the set-off would have operated as a defense to the extent for which it could have been sustained. *Green* v. *Nelson*, 12 Met. 567, 573. But as insolvency has intervened, the assessments when collected form a fund for the benefit of all the policy holders including the defendant whose demands comprise a part of the indebtedness which made the assessment necessary. The defendant received the benefit of the insurance of the subsidiary companies as a party insured, while it also became an insurer for the protection and benefit of the other members. A set-off would confer upon it a preference to the disadvantage of other creditors and policy holders, and permit it to appropriate exclusively the amount claimed in partial payment of its own demands against the insolvent, and to this extent the defendant would be relieved from the obligations of an insurer. The right invoked also has been pleaded in recoupment, but whichever form of procedure is adopted the defendant stands on an equal footing with its fellow members from the collapse of the corporation in their dual relation of insurers and of creditors. It is because of this principle of equality where an insolvent corporation of this character is being wound up for the purpose of a proportional distribution of assets, that the right of a member who is also a creditor to set off or recoup his individual loss uniformly has been denied. *Commonwealth* v. *Massachusetts Mutual Fire Ins. Co.* 112 Mass. 116. *Hill* v. *Baker*, 205 Mass. 303, 308. *Hillier* v. *Alleghany County Mutual Ins. Co.* 3 Penn. St. 470, 474. *Long* v. *Penn Ins. Co.* 6 Penn. St. 421, 424. *Stone* v. *New Jersey & Hudson River Railroad*, 46 Vroom, 172. *Lawrence* v. *Nelson*, 21 N. Y. 158. *Raegener* v. *Hubbard*, 167 N. Y. 301, 306. The company must pay the assessment, and rely on the dividend for reimbursement, and the counterclaim should have been disallowed. In accordance with the reservation in the report judgment is to be entered for the plaintiff in the sum of $12,463.24 with interest thereon from August 10, 1903, to the date of entry.

So ordered.

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UNITED SHOE MACHINERY COMPANY *vs.* EUCLID I. LA CHAPELLE.

Suffolk. December 4, 1911. — July 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Evidence. Monopoly. Equity Jurisdiction, Specific performance. *Restraint of Trade. Interstate Commerce.*

Evidence that an inventor, at the time of making a contract in writing to enter the employ of a manufacturer and to assign to the manufacturer all inventions made by him, already had assigned an invention to the manufacturer and that this was the reason he executed the contract when told by the manufacturer's general manager to sign it, has no tendency to show that the inventor was not acting voluntarily when he made the contract.

In a suit against an inventor to enforce the specific performance of a provision in a contract to assign to the plaintiff all patents obtained by the defendant upon inventions made by him while in the employ of the plaintiff and for ten years thereafter, where the patent of which the plaintiff seeks the assignment was taken out by the defendant after the termination of such employment, evidence, tending to show that the inventions assigned to the plaintiff by the defendant during the term of his employment were worth as much as he had received in weekly wages under the contract, properly is excluded as immaterial.

The making by a corporation, engaged in the business of manufacturing and leasing patented machinery used in the manufacture of footwear throughout the United States, of leases of patented machines containing conditions that the lessees shall use in the manufacture of footwear no other machines which are not manufactured by the lessor, although resulting in a monopoly, is not an infraction of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647.

Although the holder of letters patent lawfully may create an extended monopoly by imposing conditions on the use of the patent, a combination of patentees resulting in an extended monopoly is subject to the prohibitions contained in U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647.

A corporation, formed by the combination of seven or more corporations, each owning valuable patents for the making of machinery used in the manufacture of footwear, competing with each other in two thirds of the States of the Union and being all the principal shoe machinery manufacturers in the United States, which after its formation bought out competitors to at least the number of thirty and contracted with ninety-five per cent of the inventors of shoe machinery in the United States for the entire product of their inventive skill, whereby it controls from ninety to ninety-five per cent of all the shoe machinery in this country and has acquired a monopoly of inventions relating to shoe machinery, is an illegal combination in restraint of trade which has monopolized trade and commerce among the several States in violation of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647.

In a suit in equity by a corporation, engaged in the business of manufacturing and

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leasing patented machinery used in the manufacture of footwear throughout the United States, against an inventor, to enforce the specific performance of a provision in a contract in writing to assign to the plaintiff all patents obtained by the defendant upon inventions made by him while in the employ of the plaintiff and for ten years thereafter, the patent of which the plaintiff sought the assignment having been taken out by the defendant after the termination of such employment, where it was held that the plaintiff was formed and maintained by an illegal combination in restraint of interstate trade and commerce in violation of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647, it appeared that an essential means by which the unlawful monopoly was maintained was the making by the plaintiff of contracts, like the one sought to be enforced, with ninety-five per cent of the inventors of shoe machinery in the United States. *Held*, that the contract sought to be enforced was an integral part of the unlawful scheme for monopolizing commerce among the several States, and would not be enforced by the court.

BILL IN EQUITY, filed in the Superior Court on April 22, 1910, for the specific performance of a provision of a contract in writing dated January 12, 1906. The material allegations of the bill are stated briefly in the opinion. It prayed that the defendant might be ordered to assign to the plaintiff a patent, which had been obtained by the defendant after the termination of his employment with the plaintiff, of an invention of the defendant of an improvement in "pulling over machines," which are used in the manufacture of shoes in pulling the upper over the last.

The contract containing the provision sought to be enforced was as follows:

"Know all men by these presents:

"That whereas Euclid I. La Chapelle, of Ashland, Massachusetts, has heretofore made certain inventions and improvements in machinery having to do with the manufacture of shoes and the said La Chappelle now desires to enter into the employment of the United Shoe Machinery Company, a corporation organized and existing under the laws of the State of New Jersey, having a place of business in Boston, Massachusetts (hereinafter referred to as the 'United Company'), or that the said United Company shall cause the said La Chapelle to be taken into the employment of one or more of the companies in the business of which by reason of its ownership of shares of the capital stock thereof or otherwise the United Company is interested (which said companies are hereinafter referred to as the 'associate, allied or subsidiary companies' of the said United Company) upon the terms and conditions hereinafter set forth;

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"And whereas the United Company is willing to take the said La Chapelle into its employment or to cause the said La Chapelle to be taken into the employment of one or more of its associate, allied or subsidiary companies as aforesaid upon said terms and conditions.

"Now, therefore, this instrument witnesseth: That I, the said Euclid I. La Chapelle, in consideration of being taken into the employment of the said United Company or of any one or more of its associate, allied or subsidiary companies as aforesaid do hereby covenant and agree to and with the said United Company as hereinafter set forth:

"One. I, the said La Chapelle, do hereby covenant and agree that so long as I shall be employed by the said United Company, its associate, allied or subsidiary companies, I will well and truly serve the said United Company and its associate, allied and subsidiary companies in such capacity and in the performance of such duties as may from time to time be assigned to me by the said United Company or by such person or persons as may be designated for such purpose by the said United Company and that I will give my entire time and the full and entire benefit of my skill, co-operation and endeavor to the accomplishment of the purposes and the performance of the duties of said employment so assigned to me and that I will at all times faithfully and truly and to the best of my skill and ability act diligently and loyally for the promotion of the interests of the said United Company, its associate, allied and subsidiary companies.

"Two. I do hereby covenant and agree that all information concerning the business and affairs of the said United Company, or of any of its associate, allied or subsidiary companies, of which I shall at any time become possessed which is of a confidential or private nature I will carefully guard and keep and that I will at no time, either while I am in the employment of the United Company or its associate, allied or subsidiary companies, or after such employment shall have ceased, disclose any such information to any other person or employ the same in anywise other than for the benefit of the United Company, its associate, allied or subsidiary companies, in connection with my said employment.

"Three. I do hereby sell, assign, transfer and set over unto the said United Company any and all inventions, improvements,

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Letters Patent and applications for Letters Patent (both of the United States and of any and all other countries) and any and all rights or interests in, to or under inventions, improvements, Letters Patent and applications for Letters Patent heretofore made by me or now had by me or which I have any right by agreement or otherwise to acquire or take over, and any and all inventions and improvements which I may at any time hereafter during the continuance of my employment by the United Company or by any one or more of its associate, allied or subsidiary companies, or at any time within ten (10) years from the termination of any such employment, make either as sole inventor or as joint inventor with others and whether made in or out of the usual working hours or upon the premises of the United Company, its associate, allied or subsidiary companies, or elsewhere, and all inventions, improvements, Letters Patent and applications for Letters Patent (both of the United States and of any and all other countries), and all right, title and interest in, to or under inventions, improvements, Letters Patent and application for Letters Patent (both of the United States and of any and all foreign countries) which I may at any time during the continuance of my said employment by the United Company, or by one or more of its associate, allied or subsidiary companies, or at any time within said period of ten (10) years from the termination of any such employment in anywise acquire, own or control or have any right by agreement or otherwise to acquire or take over relating or pertaining in any way to footwear or to machinery, tools, mechanisms, devices, materials, supplies, processes or things intended or adapted for use in the manufacture thereof; and I do hereby covenant and agree to and with the said United Company that I will forthwith disclose to the United Company, its officers and patent solicitors, all inventions, improvements, Letters Patent, interests and rights heretofore made or now had by me and herein conveyed or provided to be conveyed and that upon making any such invention or improvement or acquiring any right, title or interest in, to or under or any right to acquire or take over any invention or improvement, Letters Patent or application for Letters Patent herein conveyed or provided to be conveyed I will forthwith disclose the same to the United Company, its officers and patent solicitors; will repeat such disclosures when and as often as requested by the United

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Company; and that I will and my heirs, executors and administrators shall at any and all times thereafter upon the request of the United Company, execute and cause to be executed any and all applications for Letters Patent, assignments and other papers in such form as shall be approved by counsel for the United Company, and will perform and cause to be performed any and all acts which may be necessary or desired by the said United Company to obtain to the said United Company, its successors, assigns or nominees, Letters Patent of the United States and of any and all other countries where it may be desired to obtain Letters Patent covering such inventions and improvements, or any of them, and to fully and completely vest and confirm in the said United Company, its successors and assigns, or in the nominee or nominees of the said United Company, the full and complete right, title and interest in, to and under all such inventions, improvements, Letters Patent, applications for Letters Patent, interests and rights, and to enable the said United Company, its successors, assigns or nominees, to secure and enjoy the full benefits and advantages thereof.

"Four. I, the said La Chapelle, do hereby further covenant and agree to and with the said United Company that I will not (without the consent in writing of the United Company first obtained) at any time during the continuance of my said employment by the United Company or by any one or more of its associate, allied or subsidiary company [companies], or at any time within ten (10) years from the termination of any such employment, in any country, either directly or indirectly, individually or in combination with others, as officer or stockholder of a corporation, or as manager, agent or employee, or otherwise (excepting as an employee of the said United Company, its associate, allied or subsidiary companies) enter into or be engaged or interested in or financially or otherwise assist any person, firm or corporation in entering into, developing or carrying on any business which consists in whole or in part of or relates or pertains in any way to manufacturing or dealing in machinery, tools, mechanisms, devices, materials, supplies, processes or things relating or pertaining in any way to boots or shoes or to the manufacture thereof, or in making, developing or exploiting any invention pertaining to such machinery, tools, mechanisms, devices, materials, supplies, processes or things, or in any business which will in any way compete or interfere

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with the business of the United Company, or of any of the associate, allied or subsidiary companies of the United Company.

"Five. It is understood and agreed that the employment herein referred to of the said La Chapelle by the said United Company, its associate, allied or subsidiary companies, shall continue so long only as shall be mutually desired by the said United Company and by the said La Chapelle and that the United Company shall pay or shall cause to be paid to the said La Chapelle during the continuance of such employment compensation at the rate of not less than twenty dollars ($20) per week.

"Six. The term 'United Company' as herein used shall be held to include the said United Shoe Machinery Company and its successors and assigns, and all covenants and agreements on the part of the said La Chapelle herein contained may be enforced by and for the benefit of the United Company, or by any one or more of its associate, allied or subsidiary companies.

"In witness whereof I, the said Euclid I. La Chapelle, have hereunto set my hand and seal this twelfth day of January, 1906.

Euclid I. La Chapelle (seal)"

The sixth paragraph of the defendant's answer was as follows:

"6. The complainant is a corporation and in the year 1899 it was constituted by a combination of all the principal shoe machinery manufacturers in the United States of America, and organized as a corporation under its present name, and by said combination it acquired control in the several states of the United States of America, of the business of manufacturing, leasing and selling throughout the United States of America of shoe machinery for manufacture of footwear and acquired the greater part of the valuable inventions which had been made prior to 1899 in shoe machinery; that by such combination of manufacturers into the complainant corporation, the complainant acquired such control of the business of making, leasing and selling shoe machinery that ever since 1899 ninety per cent of the shoe machinery in use in the United States has been that made and leased or sold by the complainant, and the complainant has kept and continued its monopoly by refusing to sell the basic and principal machines made by it for use in manufacturing footwear, and has leased the same only, to manufacturers, selling only auxiliary and unimpor-

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tant machines, and then coupled with the requirement that materials used shall be purchased only from the complainant; and, as a further means of maintaining its said monopoly the said complainant has inserted in its leases of the principal or basic machines a requirement that the lessee shall use only its, the complainant's, machinery in the manufacture of shoes, and a further provision that in case of non-performance by the lessee of such agreement the complainant may remove its machines from the lessee's factory; that it also ever since 1899 has inserted, and now inserts in such leases, with intent to continue its monopoly, a further provision that without any cause whatsoever it may abrogate the lease at any time upon thirty days' notice, and the complainant controls ninety per cent of the shoe machinery in use in the United States, and shoe manufacturers can procure no machinery elsewhere to supply all their needs and they are obliged to use only the machinery supplied by the complainant; and the complainant for ten years last past has created and during all that time maintained and now maintains a monopoly of patents relating to machinery and appliances used in the manufacture of footwear in the United States of America by contracting with a very great number of inventors of shoe machinery and appliances for making footwear, for the entire product of their inventive faculties in that line, and the said complainant, in furtherance of and as a means to that end, and an important means to maintaining its monopoly, has made during said ten years last past and is now making with a great many such inventors, contracts like that annexed to the complainant's bill, and by means of such contracts and of its monopoly of shoe machinery in use in the United States, and the requirements contained in its leases of machinery to manufacturers the complainant has for more than ten years last past monopolized and does now monopolize trade and commerce between the States and territories of the United States of America in the making, leasing and sale of shoe and footwear machinery, and does now have a monopoly thereof, and an inventor in line of shoe machinery cannot introduce by reason of the facts hereinbefore stated any new shoe machinery with manufacturers of footwear in the United States, nor can he sell his invention to any other than the complainant, and no patent relating to shoe machinery and not owned by the complainant can be used in the United States of America, all

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of which the respondent says is in violation of the Act of Congress of the United States of America passed July 2, 1890 and published in 26 U. S. Statutes at Large, Chapter 647, entitled: 'An Act to protect trade and commerce against unlawful restraints and monopolies'; and the respondent says that the contract between him and the said United Shoe Machinery Company set forth in the plaintiff's bill is a contract made in aid of restraining trade among the several States in leasing and selling shoe machinery and in carrying on the business of manufacturing it, and is in restraint of commerce between said several States under the first section of said Act of July 2, 1890, and that the said United Shoe Machinery Company by reason of said contract and of contracts such as that set forth in its bill and of its acts hereinbefore in this paragraph set forth is monopolizing trade and commerce between the several states of the United States of America in the business of manufacturing, leasing and selling shoe machinery therein, and has done so ever since 1899, and that the contract set forth in the plaintiff's bill is unlawful under the first, second, third and eighth sections of the said Act of Congress of July 2, 1890." The sections here were quoted.

In the Superior Court the case was tried before *Hardy*, J. The defendant testified that in November, 1905, he made an oral agreement with the general manager of the plaintiff to go to work for the plaintiff as an inventor of shoe machinery and then assigned to the plaintiff an invention in shoe machinery which he previously had made, and that it was at that time agreed between the general manager of the plaintiff and the defendant that a contract should be drawn up between the plaintiff and the defendant to contain the terms of an agreement then orally made by them. Upon the date of the signing of the contract the defendant went to the place of business of the plaintiff and saw the general manager of the plaintiff, and a typewritten contract was produced, which was the contract sought to be enforced. The defendant testified that he objected to the language of it, as being contrary to the oral agreement for the reason that it did not provide for the payment to the defendant of any sum other than "not less than $20 per week" as remuneration. The defendant testified that the general manager said to him "sign it" and that he objected. The following question then was put to the defendant:

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"At the time that you signed the contract, state whether or not the fact that you had already assigned the invention to the company had any effect in causing you to sign the contract?" Upon objection by the plaintiff the judge said: "If he said anything about it to Mr. Wilson, I will hear what was said on the subject, but his feeling or mental conclusion about it, I do not think have any weight." The counsel for the defendant said that he offered the evidence for the purpose of showing the reason for signing the contract; that the defendant was intimidated in that way in an equitable sense. The judge excluded the evidence, and the defendant excepted. Later in the course of the trial the defendant was asked: "Whether or not you should have signed that contract if you had not assigned that invention to the company?" Upon objection the judge excluded the question, and the defendant excepted.

The defendant offered evidence which tended to show that inventions which he made and assigned to the plaintiff while he was employed by it were worth as much as the defendant had received in remuneration under the contract. The judge excluded the evidence, and the defendant excepted.

Before the defendant produced any evidence in support of the answer, the plaintiff asked the judge to rule that the allegations contained in the sixth paragraph of the answer set forth no defense to the plaintiff's bill and that no evidence was admissible thereunder.

The counsel for the defendant stated that he desired to make an offer of proof under the sixth clause of the answer, and the judge suggested that the counsel should make the offer of proof at that time as to what he intended to offer under the sixth paragraph. The defendant thereupon offered to introduce evidence to establish the following facts:

That seven or more corporations manufacturing, selling and leasing ninety per cent of the shoe machinery in use in the several States of the United States in 1899, and which were competing in 1899 with one another in two thirds of the States in the United States in the manufacturing, selling and leasing of shoe machinery were merged into the plaintiff corporation in the year 1899; that this merger was brought about in order to prevent competition among the several companies; that ever since the merger in 1899 the plaintiff has manufactured, leased and sold ninety-five per

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cent of the shoe machinery in use in the United States and has so engaged in business in every State in the United States and in foreign countries; that the plaintiff shortly after that time, since the merger in 1899, has been buying up, and has bought up, competing corporations and persons, the number of which is at least thirty, and this for the purpose of diminishing competition; that ever since the merger the plaintiff has used leases of a form which was offered in evidence; that the plaintiff has ever since the merger in 1899 in many cases sold or leased shoe machinery at less than cost, without profit, to displace competing machinery; that the plaintiff has in at least one instance hired a workman from a competitor since 1899 with the intent to break up such competitor's business; that it has in some instances removed machinery leased to shoe manufacturers because they used competing machines, and this under the provision authorizing this action in the lease; that in one case since the merger it has procured the discharge of a factory foreman because he favored competing machinery; that the plaintiff has employed to stifle competition contracts in most cases similar in form to the one on which specific performance is sought in this case with ninety-five per cent of the inventors of shoe machinery in the United States, all with the purpose of stifling competition and restraining trade and commerce between the States; that it has undertaken to stifle competition by means of its leases, by monopolizing inventors and by maintaining a monopoly of patents relating to shoe machinery so that the plaintiff now controls ninety per cent or ninety-five per cent of the shoe machinery in the United States, and that the plaintiff has acquired by the means set forth in the offer a monopoly of inventions relating to shoe machinery.

Thereupon the judge made the ruling requested by the plaintiff and excluded the evidence offered by the defendant. The defendant excepted.

The judge found that the allegations of the bill were sustained, and ordered that a decree should be entered for the plaintiff in accordance with the prayers of the bill. The defendant alleged exceptions.

G. W. Anderson, for the defendant.

W. B. Farr, (*N. B. Todd* with him,) for the plaintiff.

Rugg, C. J. This is a suit in equity by which specific perform-

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ance of a contract between the plaintiff and the defendant is sought. The plaintiff is a manufacturer, and the defendant an inventor, of shoe machinery. The contract provided, among other matters, for the employment by the plaintiff of the defendant in designing and improving shoe machinery, terminable at the will of either party, with wages at the rate of $20 a week. One paragraph of the contract bound the defendant to assign to the plaintiff any and all inventions, improvements and patents which he should make during the continuance of the contract and for ten years thereafter, and for a like period not to engage in any similar business. The employment under the contract continued from 1906, with a brief interruption, until 1909, when it ceased. Since then the defendant has taken out a patent for some improvement in shoe machinery which he refuses to assign to the plaintiff, and this suit is to compel such assignment.

The cause comes up on exceptions, and hence only limited and narrow questions are presented. The broader issues which would be open on an appeal are not raised. Whether the contract is unconscionable and hence unenforceable, although somewhat argued, falls in this class and is left undecided by this judgment. The point is not made that the plaintiff or its conduct constitutes a monopoly or an engrossing at common law, in furtherance of which the contract in suit was made, and hence that question is left on one side.

1. The defendant offered to show that before the contract was made he had assigned to the plaintiff an invention, and that although he said nothing about it he was by reason of this fact "intimidated . . . in an equitable sense" when the general manager of the plaintiff presenting the contract told him to "sign it." There is nothing to indicate duress, or that the defendant was not a free agent when he made the contract and during the three years of work under it. Whatever may be said as to the illusory character of freedom of contract growing out of economic conditions (*Continental Wall Paper Co.* v. *Voight & Sons Co.* 212 U. S. 227, 271), the defendant utterly fails to show that he acted under any element of duress, in its legal sense, or that he suffered any injury by the exclusion of this proffered evidence. *Connolly* v. *Bouck*, 98 C. C. A. 184; 174 Fed. Rep. 312. *Silliman* v. *United States*, 101 U. S. 465.

2. It was of no consequence whether the inventions assigned by

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the defendant to the plaintiff during the term of his employment were equivalent in value to his wages. It was an implied condition of his contract that he should do his best. The value of his work to the plaintiff had no bearing upon any issue raised.

3. There are averments that the plaintiff is a monopoly perpetuated by means of conditions in leases of certain patented machines to the effect that the lessees shall use no other machines not manufactured by the plaintiff, and that the plaintiff thus secures to itself a monopoly of all machinery used in the manufacture of footwear which is alleged to be an infraction of the federal anti-trust act of July 2, 1890, 26 U. S. Sts. at Large, c. 647. The power to make such leases appears to be within the protection granted by the patents. This is settled by *Henry* v. *A. B. Dick Co.* 224 U. S. 1, decided since the argument of this case. See also *National Phonograph Co. of Australia* v. *Menck*, [1911] A. C. 336; *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, 344. Hence these allegations and the evidence offered in support of them drop out of the case.

4. The remaining material matters averred in the answer of the defendant as to alleged violation of the federal anti-trust act are in substance that in 1899 the plaintiff was constituted by the combination of seven or more pre-existing corporations competing with each other in two thirds of the States of the Union, being all the principal shoe machinery manufacturers in the United States, and that by their merger into the single organization of the plaintiff, it acquired monopolistic control of the business of manufacturing, leasing and selling throughout the United States shoe machinery for the manufacture of footwear, and that it obtained the greater part of the valuable inventions of such machinery made before 1899, and that since 1899 it has bought competing corporations to the number of at least thirty for the purpose of diminishing competition, and thus has gained control of ninety per cent of the shoe machinery business; that it has achieved and maintained its monopoly of manufacture and trade and commerce in this class of manufactures between the several States of the Union by contracting with ninety-five per cent of the inventors of shoe machinery for the entire product of their inventive skill, through contracts similar in form to that with the defendant; and that by these means it has stifled competition, so that it now controls from

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ninety to ninety-five per cent of all the shoe machinery in the United States, and has acquired also a monopoly of inventions relating to shoe machinery, and that the contract in suit was made in furtherance of that monopoly, all in violation of 26 U. S. Sts. at Large, c. 647. The court below ruled that no evidence was admissible under this averment of the answer, and excluded all evidence offered. The defendant's exceptions to this ruling present the principal question in the case.

This main inquiry divides itself into two parts: First, whether the plaintiff is itself an illegal combination in restraint of trade and has monopolized trade and commerce between the several States, and second, whether the contract sought to be enforced is a contract in direct aid of such monopoly. Both these subsidiary questions ultimately must be governed by decisions of the Supreme Court of the United States, for they relate to interstate commerce and the meaning of a federal statute touching that subject. No such decision has been made exactly covering the points presented, but as they are raised it becomes necessary to decide them.

It is to be observed that the averment of the answer is positive and direct that the plaintiff has acquired and maintained a monopoly of interstate trade in shoe machinery, and the offer of proof in this regard was co-extensive with the averment. This brings the case within the words of § 2 of the anti-trust act, which subjects to a penalty "Every person who shall monopolize . . . any part of the trade or commerce among the several States." This section is complementary of § 1 of the same act, which prohibits all contracts and combinations to the end of monopolizing trade and commerce. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–62. That decision, as we understand it, holds that the test to determine whether or not a given contract or combination is in restraint of interstate trade and commerce is the standard of reason as applied to like contracts or combinations at common law. We are not called upon to apply that rule because this record presents as its hypothesis an existing and absolute monopoly of a branch of interstate commerce founded upon a combination. When an actual monopoly is established in the sense in which that term was used in the law when the statute was enacted, then contract must be closely scrutinized to determine whether it is in furtherance thereof or unreasonable and a violation of the statute.

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The earlier conception of a monopoly was a grant of an exclusive right from the sovereign power. This still defines with accuracy that which an inventor receives under the patent laws. But in a wider sense monopoly denotes a combination, organization or entity so extensive, exclusive and unified, that its tendency is to prevent competition in its comprehensive sense with the consequent power to control prices to the public harm. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129. *United States* v. *American Tobacco Co.* 221 U. S. 106. *United States* v. *St. Louis Terminal*, 224 U. S. 383. *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330. See cases collected in Cooke on Combinations, § 116. But whatever may be the precise definition of the word monopoly as used in this statute, a business device by which a considerable number of competing corporations are welded into a single corporate entity which controls from ninety to ninety-five per cent of the commerce of the country in a particular branch required for the economical production of a necessity of mankind, is a monopoly. See *Dr. Miles Medical Co.* v. *Park & Sons Co.* 220 U. S. 373, 408; *United States* v. *Standard Sanitary Manuf. Co.* 191 Fed. Rep. 172. The modern machinery for the manufacture of footwear would seem to be a close approach to a prime necessity. See *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353, 364; *Gloucester Isinglass & Glue Co.* v. *Russia Cement Co.* 154 Mass. 92, 94; *Gamewell Fire Alarm Telegraph Co.* v. *Crane*, 160 Mass. 50; Taft, J., in *United States* v. *Addyston Pipe & Steel Co.* 29 C. C. A. 141; 85 Fed. Rep. 271, 286.

It is fairly inferable from the averments of the answer and the offer of proof that the constituent competing companies out of which the plaintiff was formed each owned valuable patents for machines used in the making of footwear. Therefore the further question arises whether a combination among several patentees of competing devices is within the inhibition of the statute. There is no decision by the United States Supreme Court covering this point, although there is an intimation in *Bement* v. *National Harrow Co.* 186 U. S. 70, 94, 95, to the effect that such a combination may be illegal under certain circumstances. The holder of a patent is given an absolute monopoly of the invention covered thereby, not affected in any degree by the Sherman anti-trust act. He may refuse to use it, or may use it in part only, or grant

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its use to others upon conditions, and he may prevent all others from infringing in any way upon the rights thus secured to him. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.* 210 U. S. 405. But he is given no immunity from general laws governing the rest of the community and not directly affecting his patent rights. He holds the thing patented subject to general police regulations. There is nothing inherent in his patent or in the nature of his peculiar privileges, which enables him to be free from general laws enacted for the common good. This is plain respecting articles dangerous to life, health or safety. *Patterson* v. *Kentucky*, 97 U. S. 501. *Webber* v. *Virginia*, 103 U. S. 344, 348. *Allen* v. *Riley*, 203 U. S. 347. The recent decision of *Henry* v. *A. B. Dick Co.* 224 U. S. 1, has emphasized the principle that a patentee may annex such conditions as he chooses to the use of the invention. It is the purpose of the patent laws to encourage the exercise of inventive genius by securing to the inventor for a limited period the exclusive control of his discovery. This is a distinct monopoly. The Dick case holds, though by a divided court, that conditions which are directed to the building up of other business than that protected by the patent may stand under its sheltering monopoly. But no question of combination under the Sherman anti-trust act was involved in that case.

It is urged by the plaintiff in substance that this aspect of the case is concluded in its favor by *Bement* v. *National Harrow Co.* 186 U. S. 70. But we do not so understand that judgment. That was an action to recover liquidated damages for breach of several contracts in relation to the manufacture and sale of patented implements. There was no finding by the referee, on whose report the decision was founded, that the plaintiff had become an illegal monopoly by reason of a combination of different persons owning distinct patents. Whatever allegations in the answer looked in that direction were not supported by the finding of the referee. In its last analysis it relates to conditions attached to the sale of patented articles. The extent of this decision is, as stated at page 91 and quoted with approval in 224 U. S. 30: "The very object of these [patent] laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use

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or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." See *National Phonograph Co. of Australia* v. *Menck*, [1911] A. C. 336. The case at bar in this aspect does not deal with conditions annexed to the use of inventions protected by letters patent. It goes a step further and touches a more fundamental consideration. A combination of persons, competing in the market under sundry patents, for the purpose of ending the competition and acquiring thereby complete mastery of a branch of interstate commerce is the gravamen of the defense. *Bement* v. *National Harrow Co.* 186 U. S. 70, and *Henry* v. *A. B. Dick Co.* 224 U. S. 1, do not affect this question. The monopoly protected by the patent goes no further than the invention and contractual obligations attached to it. It does not protect other commercial ventures attempted by the owner, even though indirectly or remotely they may relate to the invention. It may be said that inasmuch as the patentee may annex any condition to the sale of his invention, he may subject the user of it to a series of obligations as to other kindred or disconnected articles so extended in number and so comprehensive in scope as to gain an absolute monopoly the size of which would be measured only by the necessity or taste of mankind in the use of particular inventions and the commercial power of the holder of the patent. Whatever else may be said of such a monopoly, it nevertheless would be true that it would be built on the patent and not on a combination. The basic charge against the present plaintiff is the manner and means by which its monopoly has been established, namely, the combination. Conditions and combinations are different in kind. They are distinctly separate commercial agencies. They are distinguishable not in degree but in substance. Conditions annexed by the patentee to the enjoyment of an invention are legal even though resulting in an extended monopoly. Combinations among patentees resulting in an extended monopoly are illegal.

Protection by patent is established by Congress. It is not a constitutional guaranty, but depends wholly on the statutes. An act of Congress directed against evils which were assumed to arise from the monopolistic combination of those engaged in interstate commerce comes from the same source and carries the same obligation of enforcement as do the patent laws. No word or

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phrase in the Sherman anti-trust act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combination. We are unable to perceive any underlying reason for supposing that by implication growing out of economic or business conditions such an exemption was intended. There appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of the statute to one and not to the other. The conclusion seems to follow that the comprehensive condemnation of the act against every person who monopolizes interstate commerce by combination with others includes holders of patents as well as others.

The great weight of authority supports this view, although there are decisions to the contrary.* It appearing by the allegations of the answer and the evidence offered under them that the plaintiff exercises a monopoly of the interstate trade, which is not protected against the provisions of the Sherman anti-trust act by the federal patent laws, it is not necessary to pursue further the inquiry as to its unlawful character. See *United States* v. *Winslow*, 195 Fed. Rep. 578; *Strout* v. *United Shoe Machinery Co.* 195 Fed. Rep. 313.

It remains to determine whether the contract, the specific performance of which is sought, is in direct aid of the illegal combination amounting to monopoly of trade or commerce among the several States, contrary to the federal statute. Of course not

* *National Harrow Co.* v. *Quick*, 67 Fed. Rep. 130. *National Harrow Co.* v. *Hench*, 76 Fed. Rep. 667; *S. C.* 27 C. C. A. 349; 83 Fed. Rep. 36. *National Harrow Co.* v. *Hench*, 84 Fed. Rep. 226. *United States* v. *Addyston Pipe & Steel Co.* 29 C. C. A. 141, 160; 85 Fed. Rep. 271, 291. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. Rep. 155. *Indiana Manuf. Co.* v. *J. I. Case Threshing Machine Co.* 148 Fed. Rep. 21, 28. *Blount Manuf. Co.* v. *Yale & Towne Manuf. Co.* 166 Fed. Rep. 555. *Pacific Factor Co.* v. *Adler*, 90 Cal. 110. *Vulcan Powder Co.* v. *Hercules Powder Co.* 96 Cal. 510. *Craft* v. *McConoughy*, 79 Ill. 346. *Gamewell Fire Alarm Telegraph Co.* v. *Crane*, 160 Mass. 50. See *Richardson* v. *Buhl*, 77 Mich. 632, 638; *Detroit Salt Co.* v. *National Salt Co.* 134 Mich. 103; *Arnot* v. *Pittston & Elmira Coal Co.* 68 N. Y. 558; *Cummings* v. *Union Blue Stone Co.* 164 N. Y. 401; *Cohen* v. *Berlin & Jones Envelope Co.* 166 N. Y. 292, 299.

Contra: United States Consolidated Seeded Raisin Co. v. *Griffin & Skelley Co.* 61 C. C. A. 334; 126 Fed. Rep. 364. *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.* 83 C. C. A. 336; 154 Fed. Rep. 358. *Indiana Manuf. Co.* v. *J. I. Case Threshing Machine Co.* 83 C. C. A. 343; 154 Fed. Rep. 365. See *Davis* v. *A. Booth & Co.* 65 C. C. A. 269; 131 Fed. Rep. 31, 37; *Trenton Potteries Co.* v. *Oliphant*, 13 Dick. 507, 524.

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every contract of an illegal monopoly is void. Such a monopoly is not an outlaw. The principle established touching monopolies conducting interstate commerce in contravention of the Sherman anti-trust act is that their contracts which do not have a direct and immediate effect upon interstate commerce are binding and enforceable. *United States* v. *E. C. Knight Co.* 156 U. S. 1, 17. *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568. *Anderson* v. *United States*, 171 U. S. 604, 615. *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540. *Diamond Glue Co.* v. *United States Glue Co.* 187 U. S. 611, 616. *Montague* v. *Lowry*, 193 U. S. 38, 48. *Field* v. *Barber Asphalt Paving Co.* 194 U. S. 618, 623. *Engel* v. *O'Malley*, 219 U. S. 128, 139. See *Union Pacific Coal Co.* v. *United States*, 97 C. C. A. 578; 173 Fed. Rep. 737; *Whitwell* v. *Continental Tobacco Co.* 60 C. C. A. 290, 296; 125 Fed. Rep. 454; *Arkansas Brokerage Co.* v. *Dunn & Powell*, 97 C. C. A. 454; 173 Fed. Rep. 899; *Virtue* v. *Creamery Package Manuf. Co.* 102 C. C. A. 413; 179 Fed. Rep. 115. It was said in *Hopkins* v. *United States*, 171 U. S. 578, at 592, respecting contracts alleged to be in aid of an unlawful monopoly of interstate trade and commerce: "There must be some direct and immediate effect upon interstate commerce in order to come within the act. . . . Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature."

The contract which incidentally, collaterally or remotely affects interstate commerce, although indirectly in furtherance of and advantageous to interstate commerce, is not within the scope of the act. It must appear that the effect of such a contract is direct and substantial. The contract between the plaintiff and the defendant did not relate primarily to interstate commerce. It was for labor and skill alone. It had nothing to do with the transportation of

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goods. But taking the averments of the answer and the proffered evidence to be true, as we are bound to do on this record, it was made by one who had a monopoly of one branch of trade; it was one of many similar contracts with individuals enough to constitute a practical monopoly of skill in that department; it was a necessary link in a chain of contracts essential to the maintenance and preservation of monopoly in interstate trade which had been established by the plaintiff.

Such a case is within the principle announced in *Continental Wall Paper Co.* v. *Voight & Sons Co.* 212 U. S. 227, 261, that the plaintiff comes into a court of equity for aid in enforcing a contract which according to the allegation and offer of proof was intended to be and was in fact an essential part of an illegal scheme. The words of the court in *Swift & Co.* v. *United States,* 196 U. S. 375, at 396, are applicable: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin,* 195 U. S. 194, 206." The provision of the contract here sought to be enforced that for ten years after its termination every invention shall be assigned to the plaintiff savors of restraint of trade. It projects itself so far beyond the period of actual employment and payment of wages that it appears plainly to be in aid of the unlawful combination. It would choke the inventive capacity of the defendant for a period so long after his employment ceased that his usefulness to himself or to any competitor would be extinguished in most instances. When this contract is multiplied by substantially all like inventors in the country, its character as aiding the combination is too clear to require further discussion. A single contract for the employment in labor of one person is far away from interstate commerce. But when it is alleged that it is one among others with ninety-five per cent of all those skilled in a particular manufacture, and that that kind of manufacture is controlled by a combination formed of many pre-

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viously competing persons which monopolizes all or substantially all interstate commerce of that kind, the single contract for labor loses its individual aspect in the larger relation it bears to the monopoly in interstate commerce. As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the States which cannot be perpetuated successfully without contracts of similar tenor with all practising a like craft, it partakes of the illegality of the scheme.

Exceptions sustained.

EDWIN GINN *vs.* WILLIAM F. ALMY, & others.
SAME *vs.* ARGENTA MINES COMPANY & others.
SAME *vs.* FRANK S. WOOD & others.

Suffolk. March 5, 1912. — July 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, Rescission, To reach and apply equitable assets, Negligence barring suit. *Fraud. Deceit. Equity Pleading and Practice*, Bill, Trial by jury, Supplementary process, Master's report, Appeal, Decree. *Constitutional Law*, Right of trial by jury. *Writ of Protection. Husband and Wife. Corporation. Words*, "Debt."

A bill in equity against three defendants contained averments in substance that the plaintiff, by reason of his reliance upon representations by the defendants acting in concert as to material facts peculiarly within their own knowledge bearing upon the value of a certain mining property, was induced to pay to the defendants large sums of money for shares of the capital stock of a corporation, of which the defendants were officers, organized for the development of the property, and that such capital stock had no intrinsic or market value; that, relying upon other representations of the defendants as to the price for which certain other mining properties could be purchased, the plaintiff was induced to pay to the defendants other large sums of money represented by the defendants to be necessary for such purchase, and in return received capital stock in two other corporations organized for the purchase and development of such properties; that the representations upon which the plaintiff relied in both instances were false and were known to the defendants to be so, and that the defendants appropriated large portions of the money so paid by the plaintiff for their own enrichment. The plaintiff tendered to the defendants the capital stock he had received in the transactions and sought by the bill to have the transactions rescinded and the money paid by him restored to him. The defendants demurred to the bill. *Held*, that on the averments of the bill the plaintiff was entitled to relief.

The mere fact, that, in a bill in equity against several defendants in which the

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plaintiff seeks a rescission of certain transactions with the defendants which he alleges he was induced to enter into by fraud practised upon him by all of the defendants acting in concert, there are included averments as to transactions separate in point of time, as well as some demands for which, if they stood alone, only a court of law could give remedy, and alternative prayers for relief which are inconsistent with each other, does not render the bill multifarious where it appears that, because of a connection between the various fraudulent acts owing to a mercantile association of the parties, such general right of rescission and of recovery can be enforced by the court of equity without making the defense burdensome.

A claim for the repayment of money on the rescission of a sale is a "debt" within the meaning of that word as used in R. L. c. 159, § 3, cl. 7.

In a suit in equity against two defendants in which the plaintiff, by reason of fraud alleged to have been practised upon him by one defendant, seeks a rescission of certain transactions with that defendant and a repayment of sums of money paid by him to that defendant in such transactions, and in which the plaintiff joins the other defendant in whose hands he alleges there is property of the first defendant which cannot be reached to be attached in an action at law and which, under R. L. c. 159, § 3, cl. 7, he seeks to have applied in payment of the amount alleged to be due to him from the first defendant, neither defendant has a right to a trial by jury, and a denial of motions by them for jury issues is a matter of judicial discretion.

A writ of protection should not be issued at the request of the defendant in a suit in equity who is in another State, exempting him, while in attendance in this Commonwealth for the purposes of the trial of the suit, from arrest under R. L. c. 168, § 1, upon supplementary process issued under R. L. c. 167, § 80, in the suit on trial.

In a suit in equity against a husband and a wife it appeared that certain sales of shares of corporation stock by the husband to the plaintiff should be rescinded and that money paid in the transactions by the plaintiff to the husband should be repaid to the plaintiff, that previous to the sale the husband had conveyed directly to his wife a large number of shares of which those sold to the plaintiff were a part, the remainder being sold to another person, that the proceeds of the sale to the plaintiff were placed in the wife's possession and that she had received the shares of stock and, at the time of the commencement of the suit, held the proceeds of their sale for the benefit of her husband; and that she also held a second block of shares which she had received directly from her husband as a gift. *Held*, that the suit could be maintained against the wife only under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of the debt due to the plaintiff from her husband the second block of shares and the proceeds in her possession from the sale of the first block of shares.

After a full hearing of a suit in equity before a master upon issues which, although not so stipulated in writing, are expressly understood by the parties and by the master as embodying in substance the entire controversy within the pleadings, and after the master has filed a report containing a statement of the issues that were so understood to have been open at the hearing and no objection or exception to such a statement in the report has been taken, it is too late for one of the parties, by an objection and an exception to the master's refusal to report certain facts, to raise an issue not understood to have been open at the hearing.

If the owner of shares of stock in a corporation owning and developing a mine in

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a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him.

In a suit in equity for the rescission of certain purchases of shares of the capital stock of a mining corporation and the repayment of the purchase price thereof, it appeared that the defendant, who was the president of the corporation and, except for shares held by certain persons to enable them to qualify as directors, owned all of its capital stock and at all times was its directing personality, made fraudulent misrepresentations to the plaintiff as to the character and value of the mining property and thus induced him to purchase shares, that the plaintiff then became a director and thereafter purchased some further shares called "treasury stock," which he was led to purchase because he still was influenced by the same misrepresentations of the defendant and also by further misrepresentations by the defendant that such "treasury stock" was owned by the corporation and that the purchasing of it would furnish to the corporation money needed for operating expenses. The other directors did not participate in, or have any knowledge of, the fraud of the defendant. *Held*, that the mere fact, that such later purchase of shares was made by the plaintiff after he had become a director, did not as a matter of law preclude him from maintaining the suit.

In a suit in equity against the president of a mining corporation to recover amounts of money paid by the plaintiff in certain transactions in shares of the capital stock of the corporation, if it appears that the plaintiff, after he had purchased some shares from the defendant because of false representations made to him by the defendant, also purchased shares from other persons by reason of the same false representations of the defendant, and it does not appear that the defendant in any way profited by the purchases from such other persons, the plaintiff cannot recover the amounts paid in such later purchases.

Where in a bill in equity against a corporation and its president the plaintiff avers that, by reason of deceit practised upon him by the president for personal profit, he was induced to purchase shares of stock in the corporation which were owned by the president but were denominated "treasury stock" of the corporation, the plaintiff, although upon a hearing it appears that the proceeds of some of the shares so purchased by the plaintiff were paid into the corporation's treasury by the president, cannot have relief against the corporation to compel it to repay to him upon a rescission of the purchases what it thus received from its president.

The relief to be given to the plaintiff in a final decree in a suit in equity cannot be greater or different from that warranted by the facts alleged in the bill at the time of the decree, although it appears that facts found upon a hearing of the suit are such that more extended or different relief might be given if the facts so found were alleged in the bill.

Where, upon the reservation of a suit in equity for determination by this court, it appears that, as to some defendants who had not appeared at any time in the proceedings and against whom decrees had been entered that the bill be taken *pro confesso*, the bill should be dismissed, a decree will be ordered dismissing the bill as to them without costs.

In a suit in equity it appeared that the defendant had represented to the plaintiff, as the amount needed to purchase certain mining property which the plaintiff

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and the defendant desired, an amount much greater than what was needed for that purpose, that the defendant knew the representations to be false, that the plaintiff relying thereon paid to the defendant the amount stated by him to be needed and the defendant used some of the amount in purchasing the property, organized a corporation to operate it, delivered some of the shares of stock of the corporation to the plaintiff and himself appropriated so much of the money as was not needed for the carrying out of the transaction. Subsequently the corporation was consolidated with another in which the plaintiff had been induced to invest in the same way, and there were issued to him shares in the consolidated corporation which represented the shares originally issued to him in both of the corporations. Upon discovering the fraud by which the defendant had procured money from him, the plaintiff tendered to the defendant the shares of stock in the consolidated corporation, and in the suit sought to rescind his transactions with the defendant as to both of the original corporations and to recover the sums he had paid to the defendant. *Held*, that the relief sought should be granted.

THREE BILLS IN EQUITY, the first of which was filed in the Supreme Judicial Court on March 11, 1908, and subsequently was amended. The second and third bills, as stated in the opinion, have become immaterial.

The first suit originally was brought in the name of one Edward K. Robinson as assignee for Edwin Ginn, the real party in interest, who afterwards by amendment was substituted as the plaintiff. The defendants were William F. Almy, Lillian W. Almy, Frank S. Wood, George R. Angus, the Argenta Mines Company, the Alcimento Mines Company, and the Alveoro Mines Company. The principal allegations of the bill were substantially as follows:

In the summer of 1904 the defendants William F. Almy, Wood and Angus, represented to the plaintiff that the Argenta Mines Company, a corporation with $2,000,000 of capital stock, had been organized by them in April, 1902, for the purpose of purchasing and developing a copper, gold and silver mine in British Columbia; that at that time they had, "blocked out and in sight" and practically ready for shipment as soon as transportation facilities could be furnished, ore worth more than the par value of the stock, when in fact the surface indications upon which the mine had been purchased and promoted in 1902 had "pinched out" shortly after development began, so that in the summer of 1904 the mine was a demonstrated failure, as the defendants well knew. The plaintiff then was induced to purchase "treasury stock" for $50,000. At the same time the same defendants represented to the plaintiff that they were able to get at very much less than the

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real value certain other shares of the corporation's stock from the persons who owned it originally, having acquired it as part of the purchase price of the property paid to them by the corporation. In fact, such stock did not belong to the original owners but belonged to or was held in trust for one or all of the defendants. Relying on such and other misrepresentations of the defendants the plaintiff purchased a large number of shares of stock in the corporation, paying therefor large sums of money which were appropriated by the defendants for their own use.

As to the Alcimento Company and the Alveoro Company, the substance of the allegations of the bill in the first suit was that the plaintiff agreed with the principal defendants to furnish $80,000 for the purpose of buying two placer gold mines in California; that two corporations were to be formed, to which respectively, the property was to be conveyed when purchased, that the capital stock of the corporations was to be divided, after using part in payment for the properties, between the promoters and the capitalists in the proportion of three to promoters and five to capitalists; and that the defendants fraudulently misrepresented to the plaintiff that the amount of the purchase price was larger than it was, and appropriated to themselves a large part of the $80,000 furnished by the plaintiff for the purpose of buying the two properties.

Other allegations in the bill as to other defendants are described in the opinion.

The bill contained offers of tender of the shares of stock sold to the plaintiff, three prayers for injunctions *pendente lite*, and prayers (4) for a rescission of all the transactions described and the repayment to the plaintiff of all sums paid out by him thereon, with interest; (5) "that as to any and all the transactions hereinabove referred to, the said personal defendants may be found to have stood in a fiduciary relation to the plaintiff's assignor, that said personal defendants may be held to account for all sums received by them, and the plaintiff decreed to recover, and execution issue therefor, all sums appropriated by them to their own use, contrary to the duty imposed upon them by such fiduciary relationship;" (6) "that the amount of stock of the defendant corporations held by the personal defendants, or any of them, may be ascertained or determined and proper decrees made for the application of the

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same to the payment of the plaintiff's claim;" (7) that, "if, as to any or all the transactions hereinabove referred to, the plaintiff shall be found not entitled, for any reason, to a rescission, that, in the alternative, his damages by reason of the wrongs suffered may be assessed and execution issue therefor," and (8) for general relief.

The substance of the further proceedings and of the facts found by the master is stated in the opinion.

The cases were reserved for determination by the full court.

G. W. Anderson, (*E. H. Ruby* with him,) for the plaintiff.

F. H. Stewart, (*W. H. Rand, Jr.*, with him,) for the defendants Almy.

BRALEY, J. The first bill of complaint as finally amended appears to have been treated by the parties as stating substantially all the grounds upon which the plaintiff relied for equitable relief, and the remaining suits in which neither William F. Almy nor his wife, Lillian W. Almy, are defendants seem to have been instituted merely as matter of precaution. We shall follow the order adopted by them, and confine our discussion of the questions raised by the record as being covered by the pleadings in the first case. The bill having been taken for confessed against the defendants, the Alcimento Mines Company, and the Alveoro Mines Company, the remaining defendants, William F. Almy, Lillian W. Almy, Frank S. Wood, George R. Angus and the Argenta Mines Company demurred to the original bill, which although brought in the name of one Edward K. Robinson to whom the causes of action had been assigned, was amended after the demurrers were filed, by the substitution of the present plaintiff, Edwin Ginn, who was the assignor. By this amendment the second and third grounds, which are common to all the demurrers, were eliminated, leaving for decision the other causes assigned. The defendants Wood, Angus, and the Argenta Mines Company neither appeared at the argument nor filed a brief, yet if the demurrer of William F. Almy is sustained they are entitled to the benefit of the decision in so far as they relied on similar objections to the sufficiency of the bill.

It is broadly contended, that no case is stated for relief in equity, and that the plaintiff's remedy at law is plain and adequate. The second paragraph of the bill alleges, that "in all the transactions and frauds hereinafter referred to the said Wood and Angus have

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acted in concert and conspiracy with the said Almy, and these three have divided the proceeds of the moneys hereinafter complained of according to agreements made among themselves." It will be convenient in disposing of the demurrers to refer to them as the defendants, for the plaintiff constantly avers, that through their instrumentality he had been wronged and defrauded. The allegations of the third, fourth, fifth, sixth and seventh paragraphs when relieved of redundancy charge the defendants, who were officers of the corporation, with making various material, false and fraudulent representations concerning the value of the property and of the shares of the capital stock of the Argenta Mines Company for the purpose of inducing the plaintiff to buy, and that in reliance upon these representations he invested large sums of money in the purchase through the defendants of the stock of a mining enterprise having no intrinsic or commercial value. The eighth, ninth and tenth paragraphs relate to the acquisition by the defendants and the plaintiff of certain gold placer mining properties described as the Alcimento Mines Company and the Alvero Mines Company. It is charged, that through the false representations of the defendants that the ownership and control of these properties could be acquired upon payment of a stipulated sum in money, and one fifth of the capital stock of a corporation to be organized to purchase the Alcimento mine and two fifths of the capital stock of the corporation which was to be formed to take over the Alveoro mine, the plaintiff, believing the representations to be true, paid to the defendants amounts largely in excess of the purchase price for which they had bought either property, and became an owner of a large part of the capital stock. In consummation of this fraudulent scheme it is further charged, that the defendants in each of these transactions appropriated to their own use a large portion of the money received from the plaintiff exclusively for the purpose of effecting the purchase.

It would seem to be alleged with sufficient certainty that by a series of misrepresentations the defendants acting jointly obtained from the plaintiff large sums of money for worthless stock, and for investment in mining properties, which they appropriated in part for their own enrichment. The representations on which the plaintiff relied are shown by the averments to have been peculiarly within the knowledge of the defendants, and the pecuniary damage

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which he has suffered is aptly alleged to have been induced by their fraud. It is no doubt true as the defendants urge, that the plaintiff upon discovery of the deceit could have affirmed the contracts, and sued in tort for damages. *Stewart* v. *Joyce*, 201 Mass. 301, 310, 311, and cases cited. But he offers to return the stock, and by reason of the fraud practised upon him he may resort to equity to have all the transactions set aside, and if recission is granted full relief for a return of the money wrongfully obtained can be decreed. *Smith* v. *Everett*, 126 Mass. 304. *Davis* v. *Peabody*, 170 Mass. 397. *Rackemann* v. *Riverbank Improvement Co.* 167 Mass. 1. *Long* v. *Athol*, 196 Mass. 497. *Stewart* v. *Joyce*, 201 Mass. 301. *Grymes* v. *Sanders*, 93 U. S. 55.

The plaintiff if he fails to obtain relief in one form is not barred from such relief as may be applicable to the case stated by the bill. *Gerrish* v. *Towne*, 3 Gray, 82, 86, 87. *Nudd* v. *Powers*, 136 Mass. 273. *Colton* v. *Ross*, 2 Paige, 396. *Shields* v. *Barrow*, 17 How. 130. The prayers, however, which ask that if the plaintiff cannot rescind, the defendants may be decreed to have acted in a fiduciary capacity, and that an accounting be ordered of all sums appropriated by them to their own use, or that his damages may be assessed, and execution therefor awarded, are doubtless inconsistent. The defendants are not trustees or agents holding property for his benefit for which they should account, and relief in damages if rescission fails is based on affirmance, and not upon disaffirmance of the contracts. *Price* v. *Minot*, 107 Mass. 49. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495. But the bill is not rendered multifarious even if it contains inconsistent alternative prayers, and transactions separate in point of time have been joined, or demands exclusively remediable at law and over which a court of equity has no independent jurisdiction have been inserted. *Ames* v. *King*, 9 Allen, 258. *McCabe* v. *Bellows*, 1 Allen, 269. *Mayne* v. *Griswold*, 3 Sandf. 463. *Miller* v. *Jamson*, 9 C. E. Green, 41. *Gammel* v. *Young*, 3 Iowa, 297. We have said, that the purchases of Argenta stock, and of an interest in the Alcimento and Alveoro properties are but parts of what is alleged to have been a concerted attempt to defraud, and if the money thus obtained varies in amount according to the particular transaction, the plaintiff asks for the enforcement of a general right of recission and recovery, where from the mercantile association of the parties

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the fraudulent acts are alleged to have been so connected that the defendants in making their defense are not burdened by the joinder, or the court prevented from decreeing appropriate relief. *Bliss* v. *Parks*, 175 Mass. 539, 543. *Von Arnim* v. *American Tube Works*, 188 Mass. 515, 520. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461, 466, 467.

The bill also seeks under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of the plaintiff's demands property in the possession of the defendant Lillian W. Almy alleged to belong to her husband, and the corporate defendants are also joined under averments that Wood, Almy and Angus possess large holdings of stock in these companies, which cannot be reached on attachment or execution at law. The demurrants construe the frame of the bill as not setting forth a debt within the purview of the statute. But in the construction of a similar provision in the Gen. Sts. c. 113, § 2, Chief Justice Gray said in *Schlesinger* v. *Sherman*, 127 Mass. 206, 208, "the equitable jurisdiction conferred by this statute, and invoked in the bill, does not depend upon the nature of the plaintiff's debt or cause of action, but upon the existence of some property or right which cannot be come at to be attached or taken on execution at law, as security for, and in satisfaction of, the plaintiff's debt against the defendant." The amounts involved become upon recission liquidated claims founded upon an obligation of repayment by which the defendants are bound, and for which payment can be exacted by the plaintiff. This is sufficient to satisfy the requirements of the statute. *Woodbury* v. *Sparrell Print*, 187 Mass. 426, 428, 429.

It is unnecessary to refer specifically to objections which have not been argued or mentioned in the briefs, and having examined all the causes assigned we find no error in the decree of the single justice * who ordered the demurrers overruled.

Upon the coming in of the answers issue was joined, and all the defendants moved that issues of fact be framed for trial to a jury. The denial of these motions, while reviewable by the full court, was discretionary with the single justice,† whose decision should not be reversed. It is not alleged in the eleventh paragraph of the bill that the transfer of money, or of stock, by either of the defendants

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* *Rugg*, C. J. † *Braley*, J.

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William F. Almy, Wood and Angus to the defendant Lillian W. Almy was in fraud of creditors, and the cases of *Powers* v. *Raymond*, 137 Mass. 483, and *Merchants' National Bank* v. *Moulton*, 143 Mass. 543, where it was sought to have fraudulent conveyances of this character set aside and issues were framed for a jury, are not in point. The present case being grounded on the right of recission is governed by *Parker* v. *Simpson*, 180 Mass. 334, and *Lascelles* v. *Clark*, 204 Mass. 362, 377, where it was decided that the allowance of such motions, if the suit comes within the general equity jurisdiction of the court, is matter of discretion.

The cases after the demurrers and motions had been disposed of were consolidated, and the parties tried the merits before a master.* The plaintiff has waived his exceptions to the report, and before taking up the exceptions of the defendant William F. Almy, it will be convenient to determine the questions raised by the appeals from certain interlocutory orders, and to dispose of the exceptions of Mrs. Almy, and to settle finally the question of the liability of the defendants Wood and Angus.

By an order † entered without notice to the plaintiff, William F. Almy, who is described in the bill as residing within the Commonwealth, but who seems to have remained in a sanitarium in the State of New Hampshire from the inception and during the progress of the suit, was granted a writ of protection exempting him from arrest on civil process while in attendance as a party, and during a reasonable time in going to the place of trial and in returning to his foreign residence. The modification of this order ‡ on application of the plaintiff for supplementary process under the provisions of R. L. c. 159, § 8, and c. 167, § 80, permitted his arrest upon process issued at any time during the pendency of the suit if he was domiciled here, or if a non-resident, while he was within the Commonwealth. *Paine* v. *Kelley*, 197 Mass. 22. The defendant's grievance is, that after the modification, he preferred not to expose himself to the chance of arrest, and hence he had been deprived of the opportunity to appear and give his testimony before the master. He has not directed our attention to any principle of law which supports this contention. The writ issues to protect a party from arrest in other suits which have been or may

* George L. Huntress, Esquire. † By *Loring*, J. ‡ By *Loring*, J.

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be instituted whereby his attendance while his case is on trial might be greatly embarrassed or wholly prevented. *Thompson's case*, 122 Mass. 428, 429, and cases cited. The privilege is not dependent upon the writ. It is only evidence by which the arresting officer is informed that the defendant is not subject to process. *Ex parte M'Neil*, 6 Mass. 245; 6 Mass. 264. *Chaffee* v. *Jones*, 19 Pick. 260, 267. The defendant does not argue that his property could not have been attached pending the suit, yet the right of arrest where the defendant intends to leave the Commonwealth so that execution, if obtained, cannot be served upon him, is expressly given by our statutes. R. L. c. 168, §§ 1, 2. The defendant had the right to appear and contest the plaintiff's demands. Indeed, it is plain from the master's report, that the plaintiff cannot prevail except upon satisfactory proof of this defendant's material misrepresentations. But neither the defendant's property nor his person were exempt from legal process, by the use of which payment of the amount the plaintiff might recover against him could be secured. It also is manifest that the defendant during convalescence or after recovery was afforded every reasonable opportunity until the hearings before the master were finally closed, to give evidence either in person or by deposition.

The denial * of the motions to recommit the master's report, and of the petition for leave to take further testimony, and for a rehearing, having been within the discretion of the single justice should be affirmed, and we recur to the report. *American Stay Co.* v. *Delaney*, 211 Mass. 229. *Crosier* v. *Kellogg*, 210 Mass. 181.

The evidence before the master not having been ordered reported, the usual rule applies, and his findings of fact must be deemed to be final unless from the report itself they appear to have been unwarranted. *Taber* v. *Breck*, 192 Mass. 355, 360.

It is found, that "the block of four hundred thousand shares" of the capital stock of the Argenta Mines Company "although put in his wife's name, belonged to Almy, and that Mrs. Almy held it, and all proceeds realized from its sale, for the benefit of the defendant Almy." † The plaintiff by the third amendment to

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* By *De Courcy*, J.

† The entire findings of the master as to 500,000 shares of stock, part of

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the bill, sought by the allegations, that "one or more of the other personal defendants acted as the agent or agents" of this defendant in inducing him to purchase two hundred thousand shares of this stock, the remainder of which was sold to one Newton, to charge her as a participant. If relieved by the master's findings from these allegations, yet under the sixth prayer the proceeds of these shares in her possession, and the additional one hundred thousand shares, even if they were received and are held by her as a gift from him, remained the property of her husband, which can be applied in equity to the satisfaction of his debts and liabilities. R. L. c. 153, § 3. *Hawkins* v. *Providence & Worcester Railroad*, 119 Mass. 596, 599. *Brown* v. *Brown*, 174 Mass. 197, 198, 199. *Atkins* v. *Atkins*, 195 Mass. 124. See St. 1912, c. 304. The bill as to this defendant can be maintained for this purpose only, and her exceptions to the report should be overruled.

The defendants, Wood and Angus, are also exonerated by the master from all participation in any attempt to mislead, deceive and defraud the plaintiff as averred in the original bill or in the amendments. It is urgently pressed by the plaintiff, that after his purchase from Almy of the shares of "outside stock" and of the shares of "treasury stock" of the Argenta Company described in the bill and in the first amendment, he was induced through the deception practised upon him by these defendants as stated in

which the plaintiff purchased, were that they were transferred from Almy to his wife, "and new certificates issued to Mrs. Almy, one certificate for four hundred thousand shares, and one for one hundred thousand shares. Transfer was not made through any third person or corporation. . . . At this time Almy and his wife were residents of Massachusetts, and the transaction occurred in Massachusetts. Mrs. Almy claimed that she bought the block of four hundred thousand shares of stock and paid for it, but declined to state how much she paid. Her evidence, if credited, would justify me in finding that she paid a few thousand dollars. She claimed, however, that the one hundred thousand shares were presented to her by her husband as a gift. It does not seem to me material or important whether Mrs. Almy did or did not pay her husband any money for any of the stock, but I am not satisfied, upon the evidence, that she paid him anything. I find as a fact that the block of four hundred thousand shares, although put in his wife's name, belonged to Almy, and that Mrs. Almy held it, and all proceeds realized from its sale for the benefit of defendant Almy. As for the one hundred thousand shares, it was probably understood by both that they belonged to Mrs. Almy as a gift from her husband."

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the seventh paragraph to purchase more shares of the company, which are referred to in the report as the "McLaughlin and Pond stock."* The general finding, that the plaintiff bought these stocks because he could get them "at a price which he believed as less than their actual value," and that "this was the only reason which actuated the purchase," and the particular finding, that neither defendant made any misrepresentations which induced the plaintiff to buy, or intentionally misled him as to the price for which the stock could be procured, is a sufficient answer to this contention, without further recitals from the master's exhaustive review of the details. The plaintiff also cannot recover either in whole or in part the profit shared by the defendants in the sale of the Pond stock. The defendant Angus entered into no contractual relations whatever with the plaintiff. If he was personally benefited because he received a larger price from the plaintiff than that for which under the option he procured the stock from Pond, there was no prior agreement or secret understanding with Wood, who acted for the plaintiff, that a profit was to be

* These were shares of stock in the Argenta Mine Company. As to them the master's findings, besides those stated in the opinion, were in substance as follows: The McLaughlin shares were owned by the defendant Wood. The defendant Angus was a "social friend as well as a business associate of the plaintiff." The plaintiff frequently asked Angus if he knew where he could "buy some more twenty-five cent stock," meaning shares of stock of the Argenta Mines Company. Angus reported one conversation to Wood. Wood said he would sell his shares, and they were sold through Angus, it not being disclosed that they were Wood's. "At any time in 1905 and 1906 the plaintiff would have bought stock from Wood and Angus for twenty-five cents if he could have got it."

The "Pond stock" was 130,000 shares owned by one Pond, who told Angus that he was in financial difficulties and wanted to sell so as to net him about $30,000. Angus told Wood, and, asked by Wood to get a definite offer from Pond, finally got Pond to agree to sell for $25,000 and told Wood Pond would sell for twenty-five cents a share. Wood saw the plaintiff and sold the stock to him for that price, and paid the entire $32,500 to Angus. Angus paid $25,000 to Pond and afterwards divided his $7,500 profit with Wood "voluntarily in recognition of Wood's services, and because of favors which Wood had done him in the past, and because of Wood's need of money to support his family." There was "no prior agreement as to this division of profits . . . nor did Wood know that Angus was making a profit on this stock until after the transaction had been closed." Angus had no talk with the plaintiff as to the transactions.

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realized for their joint advantage. It is expressly found, that until the transaction had been closed, and the stock transferred, Wood was ignorant of the price Pond was to receive, and if as the master further finds, Angus then for charitable reasons voluntarily shared the profit equally with Wood, the latter's acceptance of the money was not a fraud perpetrated upon his principal. *Malden & Melrose Gas Light Co.* v. *Chandler*, 209 Mass. 354. As to these defendants the original bill, and the bill as amended cannot be maintained.

Of the individual or personal defendants William F. Almy alone remains, to whom we shall now refer as the defendant. The questions for decision are, whether any of his voluminous and multiform exceptions to the original report, and of the eight exceptions to the supplemental and correcting report should be sustained, and if they are overruled, what is the nature and measure of the plaintiff's relief against him.

We have considered each of the exceptions to the supplemental report which was intended to correct certain verbal and technical errors appearing in the original report, and being unable to discover that the defendant has been prejudiced, these exceptions are overruled without further comment.

It is said in *O'Brien* v. *Keefe*, 175 Mass. 274, 276, that exceptions to a master's report "is the act of appealing from rulings appearing of record, and nothing more." The master states that in accordance with the rule he prepared and furnished counsel with a draft copy of the report, and they were notified when and where they could attend and suggest such alterations as they might deem important. He further reports, that in compliance with the notice counsel came before him, and proposed certain alterations which he duly considered, and settled the final draft to which he appended the defendant's objections, which comprise the exceptions in the record. The action of the master must be taken as a denial of the defendant's requests for findings of fact and for rulings of law, as well as for a report of portions of the evidence and of additional facts which the defendant upon his view of the probative effect of the testimony considered to be material. The burden is on him to point out in the report such errors as will avoid the master's conclusions. *Sparhawk* v. *Wills*, 5 Gray, 423, 431.

It must be assumed, that more than one inference might have

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been drawn from the evidence, and the exceptions wherever they rest upon the contention that the material findings are unsupported by the entire evidence, and that fraud and deceit were not proved, cannot be sustained. The exceptions that the monetary amounts stated were assessed as compensatory damages, and are excessive also must fail. The master did not assess damages for reasons hereinafter given. Nor are the exceptions that upon all the evidence, or upon the recitals in the report the plaintiff could not rescind, tenable. The master did not pass upon this question. No rulings of law were made, but he only determined and reported the facts, and in each instance it was left for this court to decide whether the facts were sufficient to enable the plaintiff to maintain the bill. The master while not required to report evidence which would substantiate the defendant's contentions, has reported as to each particular transaction enough of the evidence to present clearly and fully the questions of law, and he was not required to do more. *Parker* v. *Nickerson*, 137 Mass. 487. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37. It also was not improper for him to elide from his report the words inserted in the draft report when referring to the defendant's requests, that "in my opinion all the facts material to the case have been found and reported." If as we have said, he has reported upon all matters referred to him, he could not be compelled or required to adopt the defendant's views as to the force and materiality of the oral and documentary testimony, or the coherency of the varying statements of the witnesses. The master's finding, and the failure to argue the question, disposes of the issue of laches raised in the answers.

The inquiry whether the plaintiff by his conduct affirmed the various purchases of stock after he had ascertained that he had been defrauded is also presented by the exceptions. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587. *Hill* v. *Hall*, 191 Mass. 253. It is doubtful if the plaintiff's attempt to gain control of the corporate management of the company, even if as the defendants claim, he sought the aid of the courts, would bar the present bill. *Raphael* v. *Reinstein*, 154 Mass. 178. The answers do not aver that his efforts were put forth after knowledge of the fraud, and if he acted in ignorance of the deception he would not be precluded from recission. *Raphael* v. *Reinstein*, 154 Mass. 178. *Browning* v. *DeFord*, 178 U. S. 196; 44 Law. Ed. 1033, and cases

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cited in note. But the decisive answer to this and kindred exceptions is, that the questions were not raised before the master. In the opening paragraphs of the report he carefully defines the issues which the parties actually tried before him, and no specific exceptions have been taken to his statements. It is too late after a fair and full trial before a master upon issues which if not stipulated in writing by the parties are expressly understood without objection as embodying in substance the controversy within the pleadings, for the defeated party to contend upon exceptions, that the report should be set aside because it was possible to have raised pertinent questions, to which no reference is made. *Kennedy* v. *Welch*, 196 Mass. 592. *Braman* v. *Foss*, 204 Mass. 404. The controverted issues which with their consent the master considered the parties were litigating, and he was to decide are as follows, "The plaintiff alleges and has offered evidence tending to prove that he is entitled to a decree which shall give him the right to rescind all the transactions with the defendants as to the purchase of certain large blocks of the capital stock of the . . . Argenta Mines Company, on the ground that he was induced to make such purchases, and pay for said stock, solely by reason of the false and fraudulent representations of the three defendants Almy, Wood and Angus, as to the value of the Argenta mine, which representations were known by the said three defendants to be false at the time they were made; that said false representations were made for the purpose of deceiving and defrauding the plaintiff, and that the plaintiff, relying solely upon said false and fraudulent representations and statements, bought the . . . stock and paid large sums of money therefor." The right to relief in the transactions relating to the purchase of an interest in the Alcimento Mines Company and the Alveoro Mines Company, rests upon similar reasons. "In their defense against the plaintiff's first contention, the defendants denied all the plaintiff's material allegations, and offered evidence tending to prove that the statements made to the plaintiff with regard to the Argenta mine were true and accurate." But if "not true and accurate" the statements "were nevertheless made in good faith upon information received from others, upon the accuracy of which the defendants relied, and had the right to rely," and that there was no intention to deceive the plaintiff who "did not rely upon any statements made by the defendants or

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either of them," but acted upon the same information relied on by the defendants as to the value of the mine. In defense of the charges relating to the other mining properties the defendants denied all of the material allegations of the plaintiff, and offered evidence tending to prove that the plaintiff "did not buy any proportion or interest" in these properties, but bought "a definite amount of the capital stock," and that "no false statements were made to the plaintiff with reference" to either property.

If there was an alternative prayer for the assessment of damages, if the right to rescind was not established, the master has not assessed damages, which under our decisions would have to be grounded upon the familiar rule, that the plaintiff would be entitled to the difference between the actual value of what he received, and what that value would have been if the defendants' representations had been true. *Thomson* v. *Pentecost*, 206 Mass. 505, 512; *S. C.* 210 Mass. 223. It is only upon the basis of rescission that the plaintiff can have a decree, for the bill cannot be maintained for the assessment of damages to be ascertained as in an action of deceit.

If thus far the discussion has been confined to the principal grounds of complaint, we have examined all of the exceptions * not specifically noticed and are of opinion that none of them are meritorious.

It is the defendant's contention, if his exceptions fail, that upon the report, with such inferences therefrom as may be properly drawn by the court, the bill as to him should be dismissed. But this result is impossible unless the explicit findings, which seem to us to be consistent and susceptible of but a single interpretation, are arbitrarily disregarded. The defendant, a trained mining engineer of recognized ability and much experience, organized the corporation described in the bill and in the report as the Argenta Mines Company, with a capital stock of $2,000,000, divided into two million shares each of the par value of one dollar. By vote of the directors, who held fifty shares to qualify them for their

* The defendant William F. Almy stated as the ground for his exceptions to the master's report that they were "for the reasons set forth in his objections" theretofore filed, referring by number to seventy-seven principal objections, one of which had two hundred and two subdivisions. These objections covered thirty-four pages of the printed record.

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office, the remainder of the stock was issued to him, and under the terms of the prospectus and subscription sheet prepared and circulated by the defendant previous to the organization of the corporation, he had proposed, that he should hold in reserve five hundred thousand shares which the directors were to have the right to sell, and to use the proceeds in working the mine and in developing the property. Yet he avers in his first answer to the plaintiff's bill as amended, that with the exception of fifty shares the entire capital was issued to him absolutely in full payment for the property. The master, however, reports, that while there was no recognized distinction on the books of the company, these shares were styled "treasury stock" and the remaining shares as "outside stock," and from time to time the defendant voluntarily furnished from his holdings the entire amount of treasury stock, and the money realized from its sale was used for the benefit of the company. The defendant sold stock at different prices to a number of purchasers, and at the request of the plaintiff an interview followed, which resulted in the purchase by, and transfer to him, of two hundred thousand shares of the outside stock standing in the name of Mrs. Almy, and one hundred and twenty-five thousand shares of treasury stock. The plaintiff contends, that in reliance upon the false pretenses of the defendant he was induced to make the investment. The defendant stated to him approximately the cost of mining, and the profits on each ton of ore, and the cubical contents of the ore bodies or veins as shown by the report of a mining engineer whom the defendant had employed were read to the plaintiff. The defendant using the statements in the report also represented, that at the prevailing price of copper, silver and lead ore produced, the gross value of the property considerably exceeded the amount for which it had been capitalized, and that the silver alone in one vein would more than pay the cost of mining and smelting. It was further represented, that the amount of ore already reported by the engineer was "but a drop in the bucket," and that "the work done up to this time was only a prospect; that the mine had not been scratched." It is settled that representations of this character in the sale of mining stock, especially where the property is in a foreign country, are not mere estimates, and seller's talk, of which the buyer must beware, but were material statements purporting to be made as of his own knowledge. *Bradley* v.

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Poole, 98 Mass. 169. *Roberts* v. *French*, 153 Mass. 60. *Kilgore* v. *Bruce*, 166 Mass. 136. *Whiting* v. *Price*, 172 Mass. 240, 241. *Gurney* v. *Tenney*, 197 Mass. 457. The master having determined that the defendant knowing the statements to be untrue made them with the express intention that the plaintiff should rely upon them, and that the plaintiff believing them to be true actually bought and paid for the stock, the necessary elements of actionable fraud are found. *Stewart* v. *Joyce*, 201 Mass. 301, 310. In these sales the title to the stock was derived from the defendant with whom the plaintiff dealt, and whom he may treat as a principal, even if he had been informed that the proceeds of treasury stock were to be transmitted by the defendant for the benefit of the company. *Raymond* v. *Crown & Eagle Mills*, 2 Met. 319. *Kingsley* v. *Davis*, 104 Mass. 178, 180. *Welch* v. *Goodwin*, 123 Mass. 71.

The plaintiff's subsequent purchases after he became a director of the company of further shares of treasury stock, described in the first amendment to the bill, is stated by the master to have been accomplished solely through his reliance upon the misrepresentations of the defendant at their first interview. In the discharge of the duties of his office the plaintiff ordinarily would be presumed to have become sufficiently acquainted with the company's affairs to have enabled him to ascertain the value of the stock, and he could not hold the defendant responsible for subsequent losses due to his own lack of ordinary prudence. But the finding is unequivocal, and should be read with the further findings that the defendant "was at all times the directing personality of the corporation," and upon the evidence it was not certain "that either Wood or Almy ever definitely stated that the stock which they were receiving was treasury stock." The master's conclusion not appearing to have been plainly unfounded it should not be reversed. The shares acquired at these sales, which comprised all of the treasury stock remaining unsold, had been transferred by the defendant to Wood as selling agent after the first sale of stock to the plaintiff. It does not appear that the directors passed any vote requesting or directing a sale, although members of the board, when the first of the two last purchases was made, stated to the plaintiff that the company needed money for the development of the property, and he conferred with them as to

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the amount required, and the purposes for which it was to be used. But the report states, that "the greater part of the conversation with regard to the purpose for which the money was needed was held with Almy, and neither Wood nor Angus participated to any extent." In the comprehensive words of Holmes, J. in *Isham* v. *Burgett*, 157 Mass. 546, 547, the defendant was "the mouthpiece of the transaction . . . although he used the name of his creature, the corporation." It is not only a warrantable, but almost a necessary inference in the absence of any contrary finding, that in selling the stock Wood acted in behalf of the defendant, even if the proceeds were needed by the company, and seem to have been turned directly into the treasury. The difference between the techincal form of these last sales, and the plaintiff's first purchase is not under the circumstances of controlling significance. It does not affirmatively appear that the parties mutually intended or understood that the company should be substituted for the defendant as the actual vendor, and the plaintiff can hold the defendant as the real principal. *Wilder* v. *Cowles*, 100 Mass. 487. *Isham* v. *Burgett*, 157 Mass. 546. *Caldwell* v. *Blanchard*, 191 Mass. 489.

The plaintiff having offered to return all of the stock however denominated, can rescind, and recover from the defendant the amounts paid, with interest from the dates specified in the report. *Bradley* v. *Poole*, 98 Mass. 169, 182, 184. *Nealon* v. *Henry*, 131 Mass. 153. *Snow* v. *Alley*, 144 Mass. 546, 555. *Thomas* v. *Beals*, 154 Mass. 51. *Gassett* v. *Glazier*, 165 Mass. 473. *Stewart* v. *Joyce*, 205 Mass. 371. *Vail* v. *Reynolds*, 118 N. Y. 297.

The defendant, as we have said, was the president and a director of the company, and if through his false representations the plaintiff as the master reports was induced to buy from strangers the "McLaughlin" and "Pond" stock, the defendant would be liable only in damages for which he must resort to an action at law. *Bradley* v. *Poole*, 98 Mass. 169. *Morgan* v. *Skiddy*, 62 N. Y. 319. *Weaver* v. *Cone*, 174 Penn. St. 104.

The plaintiff also asks for a decree against the corporation for the money paid for the treasury stock. It may be assumed, that the company which received the proceeds ordinarily could be charged with the false representations of its president if made in its behalf to induce the sales, and would not be permitted to

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profit by the fraud, and escape the burden of making restitution. *Allen* v. *South Boston Railroad*, 150 Mass. 200. *Vreeland* v. *New Jersey Stone Co.* 2 Stew. 188. *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 80. But if through any instrumentality he chose to employ, whether corporate or personal, the frauds conceived by him were committed solely in furtherance of his own purposes, and for his own profit directly or indirectly, as the report decisively shows, the company should not be held responsible. *Craft* v. *South Boston Railroad*, 150 Mass. 207. *Ashley* v. *Winkley*, 209 Mass. 509. The plaintiff, moreover, is restricted to the allegations of the bill, which cannot be enlarged by the evidence. *Malden & Melrose Gas Light Co.* v. *Chandler*, 209 Mass. 354, 358. And not having contracted with the corporation, there is no foundation on which the right to rescind as to this defendant can rest under the prayer for general relief.

The plaintiff's connection with the Alcimento Mines Company and the Alveoro Mines Company independently of his dealings with the defendant was also that of a stockholder, and if before reference to the master the bill had been taken for confessed as to each, it now is manifest from the report, that neither corporation is responsible for the plaintiff's losses. In these transactions, the defendant by false representations concerning the amount in money which he needed to pay the owner for the acquisition of each of the properties, obtained from the plaintiff large sums for their purchase, and induced him to invest in the capital stock of the corporation to be organized under these names to take over the respective mines and operate them. The properties were gold placer mines substantially similar in their physical aspects of anticipated mineral wealth, and before the plaintiff discovered the defendant's deceit the corporations were reorganized and consolidated. It is impossible upon the facts to come to any different conclusion from that of the master. By deliberate and material misrepresentations the defendant influenced the plaintiff, and obtained the money, a large part of which in the Alveoro purchase he appropriated to his own use, and if in the Alcimento purchase the amount he retained could not be exactly ascertained, the master unhesitatingly concludes, that the defendant did not pay any substantial sum, although he received from the plaintiff $30,000 to form part of a fund of $60,000 of which $50,000 was to be paid

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for the mine and $10,000 was to be used for working capital. The stockholders, including the defendant, subsequently agreed to the consolidation of the corporations, and the exchange by the plaintiff of his certificates of Alcimento stock for an equivalent number of shares of the Alveoro Mines Company was a substitution in name, but not in substance to which the defendant assented. The position of the parties had suffered no material change, and the tender of the shares under one name or the other is sufficient to restore to the defendant, what the plaintiff originally received, and not having deprived himself of the right to rescind, he can recover the entire amount paid in each transaction. *Bartlett* v. *Drake*, 100 Mass. 174. *Neblett* v. *Macfarland*, 92 U. S. 101. *Thackrah* v. *Haas*, 119 U. S. 499. *Savery* v. *King*, 5 H. L. Cas. 627. *Adam* v. *Newbigging*, 13 App. Cas. 308.

Nor is relief barred by the agreement entered into after the consolidation. The instrument is not under seal, and does not purport to be a release. The master furthermore reports, that it was executed to adjust differences relating to the amount of gold in the mines, and the cost of extraction concerning which the plaintiff claimed to have been misled by the defendant, and was wholly apart from any claim that the purchase price had been misrepresented.

It results from this review of the master's report, that all his material findings were warranted, and accordingly the plaintiff in the transactions where we have said he can rescind, should be decreed full relief under the fourth prayer of the bill. A decree is to be entered, affirming all the interlocutory decrees and orders from which appeals were taken, overruling the exceptions of the parties to the master's report and confirming the report, and dismissing the bill with costs as to the defendants Wood and Angus. The Alcimento Mines Company does not appear to have had any corporate existence when suit was begun, and as to this defendant the bill is to be dismissed without costs. *Russell* v. *Lathrop*, 122 Mass. 300. The terms as to costs, and the details and form of the decree against the defendants William F. Almy, Lillian W. Almy, the Argenta Mines Company, and the Alveoro Mines Company are to be settled before a single justice. *Goodwin* v. *Massachusetts Loan & Trust Co.* 152 Mass. 189, 203. It is unnecessary to review the master's brief reports in the remaining cases, as the first suit

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embraces the merits of the entire litigation, and these bills are to be dismissed without costs and without prejudice to the plaintiff's right of recovery under the first bill.

Ordered accordingly.

ROBERT H. GARDINER, trustee, *vs.* ROBERT H. GARDINER, executor, & others.

Suffolk. March 25, 1912. — July 1, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Capital and Income. Trust. Voluntary Association.

In a bill in equity by a trustee under a will for instructions as to whether he should treat as capital or as income certain preferred shares issued to him by the trustees of a voluntary association organized to acquire and hold securities and shares of the capital stock of certain street railway and other companies, the question of the propriety of the investment of trust funds in such shares was referred to as a question which was not presented by the record.

A deed, conveying securities of certain street railway and other corporations to trustees for the benefit of a voluntary association, provided for the issue to the associates of two classes of shares called preferred and common. The holders of preferred shares were given a preference to the amount of their holdings in the distribution of the assets of the association at the termination of the trust, and were entitled to preferential cumulative dividends of four per cent per annum. The trustees had power to dispose of or incumber the assets of the association, or to increase the issue of shares "for the purpose of providing means for the acquisition of additional property or otherwise accomplishing the purposes of the trust," upon a vote of two thirds of each class of shareholders. At a time when, because for several years dividends of four per cent had not been paid to the preferred shareholders by reason of lack of income, they would have been entitled to be paid dividends of seventeen and three quarters per cent before any dividend could be paid to common shareholders, and when there was no income immediately available or reasonably to be anticipated to pay such arrears, the trustees with the consent of the necessary number of shareholders voted to issue new preferred shares "in payment of the dividend arrears on the preferred shares now outstanding." Some of such new preferred shares were issued to a trustee under a will which provided for the payment of the income of the trust fund to certain beneficiaries for life, and the trustee by a bill in equity sought instructions as to whether he should treat such shares as capital or as income. *Held*, that the shares should be treated as capital.

BRALEY, J. The plaintiff, who is trustee under the will of Charles Amory, Jr. received from his predecessor, and now holds as part

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of the trust estate, seventy preferred shares in the Massachusetts Electric Companies, a voluntary association or trust organized to acquire and hold certain shares of the capital stock and securities of street railway and other companies, for the benefit of the holders of the preferred and common shareholders of the association as expressed in the agreement and declaration of trust. The propriety of the investment of trust funds in securities of this character is not presented by the amended record, and this question is postponed for decision until it properly arises. In the distribution of assets upon the termination of the agreement the shares, held by the plaintiff are given a preference over the common shares, and also are entitled to preferential semi-annual cumulative dividends at the rate of four per centum yearly during the life of the association. The dividends having been deferred for a considerable period, the plaintiff in common with the other preferred shareholders was offered additional preferred shares in payment of the arrears, and, having accepted the offer, he asks for instructions whether when received the shares should be treated as capital or imcome, and if considered as income whether they should be apportioned between the present beneficiaries for life, and the executor of the will of the testator's widow, to whom the income was payable during her life, but who died while the dividends were in suspension.

By the terms of the agreement the title, with full and exclusive authority to control and manage the property of the association, was conferred upon the trustees, but they could not sell, mortgage, pledge, encumber or dispose of any shares of stock or other property unless the consent of the holders of at least two thirds of each class of shares had been given at a meeting called for the purpose. The amount of capital is definitely fixed by the agreement, with an express provision that "for the purpose of providing means for the acquisition of additional property or otherwise accomplishing the purposes of the trust," the trustees, upon approval of a like proportion of each class of shares, may issue and dispose of additional shares upon such terms as the shareholders may determine, and the sanction of the required number of shareholders having been obtained and the parties not having questioned the validity of the issue of new shares, it may be assumed that they can be issued lawfully.

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The material reasons which induced the trustees to recommend, and the shareholders to vote the increase are found in the agreed facts. To ascertain whether the distribution is to be treated as money taken from the treasury and used as income, or is capital to be held as an investment, it is necessary to review them. *Lyman* v. *Pratt*, 183 Mass. 58, 60, 61. The common shares while having a market value, apparently never have received a dividend, but from time to time additional preferred shares have been issued and sold to the general public, and the proceeds used in payment for enlargements of the property. A substantial period ensued, when the regular dividend on the preferred stock, not having been earned, fell into arrears to the extent of seventeen and three quarters per centum on the outstanding preferred shares. When this depression had somewhat abated fractional dividends were paid, followed by a resumption of the full rate, which has been since maintained. The deficiency could have been met if the net earnings had been sufficient. But the amount being in excess of any available surplus the trustees in their report to the shareholders stated, that while the association would be benefited if the accumulated dividends were paid, yet as its resources did not permit a disbursement in cash, and it being inadvisable to create a floating debt impairing its credit, they recommended the issue of additional preferred shares to be offered at par in payment to the holders of the outstanding preferred shares. The provisions of the contract with the preferred shareholders established an agreement between all the holders of the preferred and common shares and the association for the division of profits and of assets. *Page* v. *Whittenton Manuf. Co.* 211 Mass. 424. But under the agreement the trustees, and the members of the association, could not properly declare dividends unless the surplus earnings were sufficiently ample for their payment, and the limitation is recognized by the vote, which distinctly recites that the shares were issued "in purchasing the arrears of dividends on the outstanding preferred shares." *

* The vote of the shareholders was one of consent that the trustees might issue additional preferred shares and might "use the same in purchasing the arrears of dividends on the outstanding preferred shares by giving in payment therefor one of said additional preferred shares for each one hundred dollars of said arrears and proportional fractions of a share for less amounts." The trustees voted to issue such new shares "in payment of the dividend arrears on the preferred shares now outstanding."

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Field v. *Lamson & Goodnow Manuf. Co.* 162 Mass. 388, 393, and cases cited.

It is the substance, however, and not the technical form of the transaction which determines the result. *Leland* v. *Hayden*, 102 Mass. 542, 550. *Heard* v. *Eldredge*, 109 Mass. 258, 260. *Rand* v. *Hubbell*, 115 Mass. 461, 474, 475. *Adams* v. *Adams*, 139 Mass. 449, 452. If the vote can be interpreted as a voluntary recognition of the preferred shareholders' contractual rights, which might not be enforced until the winding up of the association, even then it was not intended as a distribution of saleable shares based upon actual earnings. The capitalization had been deliberately increased as there were no profits for division, and if the financial outlook at the time had improved, a surplus of future net earnings sufficient to meet the outlay could not have been reasonably anticipated.

The dividend if declared by a corporation would be considered to have been an increase of capital, and not a product of the corporate business. *Daland* v. *Williams*, 101 Mass. 571. *Leland* v. *Hayden*, 102 Mass. 542. *Rand* v. *Hubbell*, 115 Mass. 461. *Davis* v. *Jackson*, 152 Mass. 58. *Lyman* v. *Pratt*, 183 Mass. 58. *Hyde* v. *Holmes*, 198 Mass. 287. *Gray* v. *Hemenway*, 206 Mass. 126. *Gray* v. *Hemenway*, *ante*, 239. After the enlargement of the permanent capital the property of the association neither had been increased nor diminished, and the preferred shareholders when the new shares have been issued will represent according to their holdings the same proportional preferences, which in the event of liquidation entitles them to priority over the common shareholders. *Page* v. *Whittenton Manuf. Co.* 211 Mass. 424. *Gray* v. *Hemenway*, *ante*, 239. *Gibbons* v. *Mahon*, 136 U. S. 549, 560. And while the association is not a creature of our statutes governing the formation and powers of corporations, but is organized and exists at common law, there is no ground for any distinction in the application of the principle announced in our decisions, that in whatever manner described or apportioned, an addition to capital stock generally is treated as capital belonging to the remainderman, and not to the beneficiaries for life. *Leland* v. *Hayden*, 102 Mass. 542, 550. *D'Ooge* v. *Leeds*, 176 Mass. 558, 561.

We are accordingly of opinion that, there having been no fund which could be designated either as profits, undivided earnings or

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accumulated surplus sufficient to meet the disbursement necessary to discharge the arrearage, the issue of new shares must be deemed an addition to the outstanding capital of the association. The petitioner therefore is instructed, that when received the additional shares form part of the principal of the trust, and only the income therefrom is payable to the beneficiaries for life, Annie L. Dexter and Susan C. Amory, in equal shares under the terms of the testator's will.

Decree accordingly.

J. G. Palfrey, for the executor of the will of Mary Louisa Amory.
R. H. Gardiner, Jr., for Annie L. Dexter and Susan C. Amory.
A. D. Hill, guardian *ad litem*, *pro se*.

SARAH M. ALDRICH *vs.* CITY OF BOSTON.

Suffolk. November 17, 1911. — September 11, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Statute, Construction. *Boston. Way.*

The provision contained in St. 1799, c. 31, § 4, "that no canopy, balcony, platform of cellar-door, or step in any street, lane or alley, in the town of Boston, shall project into such street more than one tenth part of the width of the street, and in no case more than three feet," although negative in form is permissive in its nature.

Section 4 of St. 1799, c. 31, which provides "that no canopy, balcony, platform of cellar-door, or step in any street, lane or alley, in the town of Boston, shall project into such street more than one tenth part of the width of the street, and in no case more than three feet," applies to steps below the surface of the sidewalk of a highway, which lead to the basement of a house, and an unguarded opening containing such steps which projects only two feet into a street thirty feet wide is not a defect in the highway for which the city of Boston can be found to be liable under R. L. c. 51, § 18.

TORT against the city of Boston under R. L. c. 51, § 18, for personal injuries sustained on November 25, 1901, and alleged to have been caused by a defect in the sidewalk of Salem Street, a highway of the defendant. Writ dated February 5, 1902.

In the Superior Court the case was tried before *Schofield*, J. The alleged defect was an opening in the sidewalk of Salem Street

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containing a short flight of steps leading to the basement of a house. The width of Salem Street was thirty feet. The opening, the steps and the house had been in existence in the same place for over forty years before the date of the accident. The defendant relied on St. 1799, c. 31, § 4, which is quoted in the opinion, where also the evidence material to that defense is stated.

The judge ordered a verdict for the defendant and reported the case for determination by this court. If the action could be maintained on the facts stated in the report, judgment was to be entered for the plaintiff in accordance with a stipulation of the parties, the terms of which have become immaterial. If the action could not be maintained, judgment was to be entered for the defendant on the verdict.

The case was submitted on briefs.

S. K. Hamilton & T. Eaton, for the plaintiff.

J. A. Campbell, for the defendant.

HAMMOND, J. The opening extending from the line of the buildings two feet into the sidewalk was "three and sixteen one hundredths feet long and from ninety-two one hundredths of a foot to three feet deep." It contained a flight of four steps descending from the level of the sidewalk to the basement of the house, the top step being about eleven inches below the surface of the sidewalk. There was no guard or railing of any sort about the opening. While in the exercise of due care, in a dark and foggy evening, the plaintiff stepped into this opening and was thereby injured. At the close of the evidence a verdict for the defendant was rendered by order of the presiding judge; and the case is before us upon his report.

The main ground of defense is that the steps were lawfully in the street by virtue of the fourth section of a statute passed on June 22, 1799, St. 1799, c. 31, § 4. The section reads as follows: "No canopy, balcony, platform of cellar-door, or step in any street, lane or alley, in the town of Boston, shall project into such street more than one tenth part of the width of the street, and in no case more than three feet; and all cellar-doors hereafter to be made or repaired, shall be built with upright cheeks, and shall not project from the line of the house more than six inches. And if any proprietor or owner of any such canopy, balcony, platform or cellar-door, or steps, shall refuse or neglect to remove or take

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down the same, within five days after notice and direction given him or them by the surveyors of highways, . . . such owner or proprietor shall forfeit and pay the sum of two dollars, for each and every day the same shall remain after the expiration of the said five days." This language although negative in form is permissive in its nature. *Cushing* v. *Boston*, 122 Mass. 173.

The statute of which this section is a part is entitled "An Act to regulate the paving of streets in the town of Boston, and for removing obstructions in the same." The first and second sections provide for the paving of streets and the manner in which they shall be paved, both as to the sidewalk and the carriageway. The third section simply provides for the laying out and widening of such streets. Then comes the fourth section above quoted. The remaining sections forbid the setting of posts and planting of trees without a permit and prescribe how far posts and a "bow-window or other window" may project into the street, forbid the unlawful placing of merchandise in a street, and regulate the time vehicles may stand in the streets.

It will be observed that the language used to indicate the removal of the obstruction after notice is "to remove or take down." There is no express suggestion that there is to be anything done in the way of filling up a hole. These terms used seem to suggest the removal of something either on or above the surface of the ground. It is further to be observed that the first clause of the section applies not to an upright cellar door but to the platform of the cellar door, or what is commonly called a bulkhead. All obstructions, namely, canopy, balcony and platform, are above the ground. Then follows the word "step." It may be said that this word used with reference to street obstructions seems to suggest only steps ascending from the level of the street. Moreover it is here preceded by terms no one of which describes things below the surface of the street. In view of these considerations there is considerable strength in the view that the only steps to which the statute relates are those above the surface.

But upon further reflection it seems reasonably clear that this is not the true interpretation. The statute speaks of the platform of the cellar door. That means as before said the platform which covers the entrance to the cellar, commonly called the bulkhead, or in other words it is the platform formed by the cellar door when

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closed. The platform may consist of one piece or more, being when closed parallel with the surface of the street, or forming with it an angle more or less acute. By the statute this platform may project into the street three feet. It covers the entrance to the cellar. In most cases the cellar floor must be several feet below the level of the street. The beginning of the entrance to the cellar may be three feet from the side of the house. All this plainly indicates that the cellar is to be reached by steps. The only reasonable conclusion is that the word "step" includes steps leading to the cellar as well as those ascending from the street. Any other interpretation fails to reach the true meaning of the term "platform of cellar-door" and the reason for its insertion in the statute. This view is strengthened by the second clause, which provides that "all cellar-doors hereafter to be made or repaired, shall be built with upright cheeks, and shall not project from the line of the house more than six inches." That is to say, the old platform method of constructing cellar entrances was not to be further allowed except in cases then existing. In all cases of new construction or substantial repair, the cellar door must be upright and could not extend more than six inches into the street.

If it be said that this interpretation legalizes pitfalls dangerous to the traveller upon the streets, the answer is obvious. It must be remembered that at the time this statute was passed, now more than one hundred years ago, Boston was a comparatively small town and was by no means so thickly settled as it is to-day. This statute indicates, and there is no reason to doubt, that there were at that time many cases where the cellar steps projected from the house into the street, especially where the cellar doors formed a platform over the cellar entrance. The time had now come to pave some of the streets. It was a convenient time to indicate a little more sharply than theretofore had been done the use which the abutters should make of the streets in the way of building upon or over them; and the evident intent of the statute was to do this. But this use could be at any time stopped if required by the highway surveyors. The obstruction, after five days from notice to remove, becomes a nuisance and can be removed. It seems clear that the purpose and effect of the section was first to legalize, at least temporarily, a certain use of the streets by the abutters, and to provide for the cessation of this use whenever the

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highway surveyors, acting not as the agents of the city but as public officers, should think it best.

The steps in question do not project into the street farther than permitted by the statute. It does not appear that any notice for their removal ever has been given. The case is like *Cushing* v. *Boston*, 122 Mass. 173; *S. C.* 124 Mass. 434, and 128 Mass. 330. The statute under which that case arose is in all material respects like the one before us. In that case, it is true, the steps were above the surface; but if this statute applies to steps below the surface as we think it does, then the doctrine of *Cushing* v. *Boston* is applicable. In the last report of that case, 128 Mass. 330, Endicott, J., after referring to the two previous decisions, states the rule of law in the following language: "On both occasions it was held that, under the St. of 1824, c. 16, § 3, these steps, which projected less than three feet into the highway, and were properly constructed and in good repair, could be lawfully maintained by the abutter, were not a nuisance, and did not constitute an illegal obstruction in the highway. Whether they rendered the highway unsafe for a traveller in the night-time, using due care, was entirely immaterial; they were authorized by law; the defendant could not remove them; and was under no obligation to place railings or other safeguards around them for the protection of travellers."

The rule thus stated governs this case. See also for discussion of the law in analogous cases, *Young* v. *Yarmouth*, 9 Gray, 386; *Commonwealth* v. *Boston*, 97 Mass. 555.

It becomes unnecessary to consider the otner grounds of defense. The verdict for the defendant was rightly ordered. In accordance with the terms of the report there should be judgment for the defendant; and it is

So ordered.

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CHARLES H. NEAL *vs.* SARAH A. JEFFERSON, executrix.

Plymouth. January 11, 1912. — September 11, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON & DECOURCY, JJ.

Landlord and Tenant, Covenant to renew. *Covenant. Damages*, In contract.

In an action against a lessor of real estate for a breach of a covenant, in a lease for one year, to execute before a certain date at the request of the plaintiff a new lease for the further term of two years at the same rent, it is no defense that before such request the lessor sold and conveyed the leased premises to a third person with notice of all the terms of the lease. In such an action it is not material to determine whether the plaintiff could enforce the covenant specifically against the defendant's grantee.

In an action for the breach of a covenant, in a lease to the plaintiff of a hotel in Florida for one year, to execute at the request of the plaintiff a new lease for the further term of two years at the same rent, where a breach of the covenant by the defendant was proved, it appeared that the property best could be used as a hotel for winter visitors and was intended so to be used, and that when the lease was made both parties understood that the plaintiff did not expect to make any substantial profit during the first year but did expect to do so during the next two years and that it was for this reason that the covenant for renewal was inserted. The plaintiff, who had had long experience in the hotel business, testified to his actual receipts and expenditures during the time that he was in possession of the hotel and as an expert testified to his opinion of what could be realized during the two following years and of the consequent value of the leasehold estate. *Held*, that in the assessment of damages the jury properly could consider the evidence of prospective profits and that this evidence was not so speculative or uncertain as to preclude the recovery of such profits as the plaintiff had shown that he would have realized.

In an action for the breach of a covenant, in a lease to the plaintiff of a hotel in Florida for one year, to execute before a certain date at the request of the plaintiff a new lease for the further term of two years at the same rent, it appeared that before such request the defendant sold and conveyed the hotel to a third person, who, two or three months before the date when the plaintiff was entitled to the new lease from the defendant, informed the plaintiff of his purchase and offered to give the plaintiff a new lease at a somewhat higher rent. The plaintiff refused to accept such a lease and demanded from the defendant performance of the covenant of renewal. There was evidence of prospective profits which the plaintiff was entitled to have considered by the jury. *Held*, that the plaintiff was not bound to accept the offer of the third person for the purpose of reducing the damages which otherwise he might claim, because until the time for the performance of the covenant he had the right to assume that the defendant would perform or would procure the performance of his obligation.

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CONTRACT for the alleged breach of a covenant of renewal in a lease. Writ dated October 31, 1910.

In the Superior Court the case was tried before *Dubuque*, J. The defendant was the executrix of the will of Joseph Jefferson, late of Bourne. The lease was dated May 22, 1909, and was for the term of one year from November 1, 1909, at the annual rent of $1,000. The lessor was described as "the estate of Joseph Jefferson." The covenant sued upon was as follows: "And the said lessor further covenants that it will, on or before the first day of June, A. D. 1910, at the request of the said lessee, execute to and with him a new lease of the premises herein leased, for the further term of two years, to commence from the expiration of the term hereby granted, at the same yearly rent, payable in like manner and with and subject to the like covenants, agreements and provisos, except the covenant for further renewal, as are herein contained."

The leased premises consisted of the Hotel Jefferson in West Palm Beach in Florida and an adjoining cottage with the furnishings. The plaintiff had conducted a hotel at Onset in this Commonwealth for fourteen years and had been in the hotel business since 1876. The plaintiff testified that at the time of the negotiations for the lease he told the defendant's agent that he did not expect to be able in the first year to do more than make his expenses, that the business should double in the second year and in the year to follow should increase one third.

On March 10, 1910, the defendant, as executrix, sold the leased premises to two brothers named Anthony and delivered to them the duplicate original of the lease to the plaintiff. On March 27, 1910, the plaintiff closed the hotel and at the end of March left West Palm Beach. The plaintiff testified that before he left West Palm Beach the Anthony Brothers told him that they had bought the hotel and tried to get him to take a new lease at a higher rent. In a letter to the plaintiff dated April 16, 1910, one of the Anthonys named the terms on which they would give the plaintiff a lease for three years. After a correspondence between the plaintiff and the agent of the defendant, in which the plaintiff insisted on his right to a renewal of the lease for two years, the plaintiff made a formal demand for such renewal in a letter dated May 9, 1910, to which the agent of the defendant replied that, as the property was sold on March 10 and the lease was as-

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signed to the purchasers, the Joseph Jefferson estate had nothing whatever to do with any extension of the lease. The plaintiff testified that for the season of 1909–1910 his total receipts from the leased property as shown by the cash book were $6,152.59 and that his total expenditures were $5,239.28, leaving a balance of $913.31; that he estimated the receipts for the following two years at $8,000 a year and the expenditures at $6,000 a year; that in his judgment the money value of the leased property on June 1, 1910, for two years at a rent of $1,000 a year to a person in his position engaged in his special business would be $2,000 a year or $4,000 for the two years and that this amount would be clear profit.

At the close of the evidence both parties asked for certain rulings. The defendant asked the judge for twenty-one rulings, which included the following:

"1. On all the evidence the plaintiff is not entitled to recover."

"6. After the transfer of the Hotel Jefferson and Huffstetter Cottage to the Anthonys, with notice of the lease to the plaintiff and the covenant for renewal contained therein, Sarah A. Jefferson was not liable for any failure of the Anthonys to respect the plaintiff's right to a renewal lease.

"7. After the transfer of the Hotel Jefferson and Huffstetter Cottage to the Anthonys, with notice of the lease to the plaintiff and the covenant for renewal contained therein, Sarah A. Jefferson was no longer liable on that covenant for renewal."

"10. If you find that Sarah A. Jefferson, executrix, transferred the reversion in the Hotel Jefferson and Huffstetter Cottage to persons by the name of Anthony, who had notice of the lease of the plaintiff and also the covenants contained therein, then, after that transfer, Sarah A. Jefferson, executrix, would stand only in the position of surety for the performance of those covenants by the Anthonys."

"12. If you find that while the plaintiff was in possession, as lessee, of the Hotel Jefferson and Huffstetter Cottage he had notice that the reversion had been transferred to the Anthonys with notice of his lease and the covenants contained therein, and thereafter, knowing that the Anthonys would not execute a renewal lease, relinquished possession of the premises and gave no notice — until a few days before the bringing of this action — to Sarah A. Jefferson that the Anthonys had not executed their renewal

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lease when it was due, then the plaintiff lost his rights against Sarah A. Jefferson in regard to a renewal lease, and his sole remedy is against the Anthonys.

"13. The measure of the damages, if any, which the plaintiff is entitled to recover is the difference between the amount of rent which would have been payable by him under the renewal lease and the rental value of the premises

"14. Neither the profits of the plaintiff for the year November 1, 1909,–November 1, 1910, nor his prospective profits for the two following years, are evidence of the rental value of the premises.

"15. In determining the rental value of the premises covered by the lease for the years November 1, 1910,–November 1, 1912, you should consider the amount of rent which lessees were willing to pay for these premises in those years and years a short time before.

"16. In determining the rental value of the premises covered by the lease for the years November 1, 1910,–November 1, 1912, you should not consider the plaintiff's prospective profits."

"21. In determining the rental value of the premises covered by the lease for the years November 1, 1910,–November 1, 1912, if you consider any prospective profits of the plaintiff, you must consider, in reduction of these profits, any opportunity the plaintiff may have had to obtain the Hotel Jefferson for those years from the Anthonys."

The judge refused to make any of these rulings.

The first ground of defense in the defendant's amended answer, referred to in the second ruling requested by the plaintiff, was as follows: "That on or about March 12, 1910, the defendant, as executrix of the estate of Joseph Jefferson, conveyed all her rights in and to the reversion in the premises referred to in the plaintiff's declaration to persons by the name of Anthony, and at or before the time of said conveyance gave to said persons notice of the existence of all the terms of the lease set out in paragraph three of the plaintiff's declaration."

The judge gave certain of the rulings requested by the plaintiff, of which the first and second, referred to in the opinion, were as follows:

1. It is admitted that the lease containing a covenant of renewal was executed in behalf of the defendant and under author-

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ity from her; that the plaintiff performed all the covenants which were to be performed by him and duly demanded a renewal; and that the defendant failed to procure such renewal for the plaintiff. On these admitted facts the plaintiff is entitled to recover unless the defendant has established some defense.

2. With respect to the first ground of defense in the defendant's amended answer, I instruct you that that raises solely a question of law, and I further instruct you that as a matter of law the facts there alleged constitute no defense. The defendant could not, and did not, discharge herself of liability on the said covenant of renewal, even if you are satisfied that she sold the reversion in the leased premises to other persons and gave them notice of the existence of all the terms of the said lease. The said covenant of renewal was a personal obligation of the defendant, and her liability thereunder to the plaintiff was not discharged by any relations or dealings between her and third parties; and if said covenant was broken the plaintiff was not bound to try to obtain redress against such third parties. The law on that point has been stated by the Supreme Judicial Court in these words, "Lessors cannot get rid of the burden of their contracts by conveying their land. In the case of the tenant as in that of the landlord, 'it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object.'"

In regard to the recovery of anticipated profits the judge, among other instructions, instructed the jury that they were to consider such profits only if they could find with a fair degree of certainty what the loss was and that it was the natural consequence of a breach of the contract by the defendant.

The jury returned a verdict for the plaintiff in the sum of $4,116; and the defendant alleged exceptions.

The case was argued at the bar in January, 1912, before *Rugg*, C. J., *Morton, Hammond, Sheldon,* & *DeCourcy*, JJ., and afterwards was submitted on briefs to all the justices.

M. Donald, (*P. Ketchum* with him,) for the defendant.

E. H. Warren & *C. G. Lewis*, for the plaintiff, submitted a brief.

SHELDON, J. It is not material to determine whether the plaintiff could have enforced specifically against the defendant's gran-

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tees her agreement to give him a new lease. However this might be, the defendant was personally liable upon her covenant, and her conveyance of the leased premises did not relieve her from that liability. *Riley* v. *Hale*, 158 Mass. 240. *Jones* v. *Parker*, 163 Mass. 564, 568. *Carpenter* v. *Pocasset Manuf. Co.* 180 Mass. 130, 133. See *Manning* v. *Fitch*, 138 Mass. 273; *Tufts* v. *Atlantic Telegraph Co.* 151 Mass. 269. The cases of *Hickey* v. *Railway Co.* 51 Ohio St. 40, and *Sexauer* v. *Wilson*, 136 Iowa, 357, relied on by the defendant, turned on what was regarded in those cases as the intention of the parties. We need not consider whether, upon similar facts, we should follow those decisions. No such intention appears in this case as was found there. It follows that the judge acted rightly in refusing the defendant's first, sixth and seventh requests for instructions, and in giving the plaintiff's first and second requests. And we find no error in the way in which the other requests bearing upon the issue of liability were dealt with.

Where a lessor has prevented the lessee from entering and occupying the leased premises, or where an owner of property has broken his agreement to give a lease thereof to a prospective tenant, the measure of damages in an action for this breach of contract, if no rent has been paid and if nothing further appears, is the difference between the actual value of the leasehold estate that should have been enjoyed and the agreed rental that was to have been paid therefor. *Jewett* v. *Brooks*, 134 Mass. 505. *Riley* v. *Hale*, 158 Mass. 240. *Dodds* v. *Hakes*, 114 N. Y. 260. *Giles* v. *O'Toole*, 4 Barb. 261. *Denison* v. *Ford*, 10 Daly, 412. *Cilley* v. *Hawkins*, 48 Ill. 308. This value, as in all cases in which the value of real estate or an interest therein is concerned, means the value for any and all uses to which the property is adapted and can readily be applied. If it is capable of being used in some particular way and has an enhanced value by reason of its availability for such use, the fact may be shown, and the value to be ascertained is the value thus enhanced; not because this is any other or greater value than the real market value of the property, but because it is the real value which is the subject of inquiry, and that value must depend much upon the nature of the property and its availability or adaptability for advantageous or profitable use. This rule generally has been applied where the value of property taken for a public use is to be determined, but it is not

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limited to such cases. *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35. *Maynard* v. *Northampton*, 157 Mass. 218. *Blaney* v. *Salem*, 160 Mass. 303. *Sargent* v. *Merrimac*, 196 Mass. 171, 178. The value of a leasehold estate, like that of any interest, is to be determined with reference to the use to which it can be most advantageously put. *Manning* v. *Fitch*, 138 Mass. 273. *Tufts* v. *Atlantic Telegraph Co.* 151 Mass. 269.

In this case both parties agreed that the property could best be used as a hotel for winter visitors, and that it was intended to be so used; and if that was so, the measure of damages was *prima facie* the value of the property for this use during the two years after June 1, 1910, over and above the rent which was to be paid therefor. That there might be some difficulty in fixing this value, or that its determination must be partly the result of an estimate rather than of an exact computation, does not affect the application of the rule. *Magnolia Metal Co.* v. *Gale*, 189 Mass. 124, 133. *Hunt* v. *Boston Elevated Railway*, 199 Mass. 220, 225. *Page* v. *Johnston*, 205 Mass. 274, 278. Putting the case in another way, the plaintiff has been prevented from making that use of the property which it was contemplated that he should make, and he is entitled to the damages which thus have been caused to him. *Townsend* v. *Nickerson Wharf Co.* 117 Mass. 501, 503. *Kostopolos* v. *Pezzetti*, 207 Mass. 277. *Snow* v. *Pulitzer*, 142 N. Y. 263. *Stewart* v. *Lanier House Co.* 75 Ga. 582.

Moreover, according to the evidence, both parties understood that the plaintiff did not expect to make any substantial profit during the first year, but did expect to do so during the next two years, and it was for this reason that the covenant for renewal was inserted. If so, the jury could give to him such prospective profits as it was fairly proved that he would have realized. This was the rule stated in *Hadley* v. *Baxendale*, 9 Exch. 341. And see *Jaques* v. *Millar*, 6 Ch. D. 153; *Dexter* v. *Manley*, 4 Cush. 14; *French* v. *Connecticut River Lumber Co.* 145 Mass. 261; *O'Brien* v. *Worcester*, 172 Mass. 348, 354; *Speirs* v. *Union Drop Forge Co.* 180 Mass. 87; *Leavitt* v. *Fiberloid Co.* 196 Mass. 440, 446; *Hanson & Parker* v. *Wittenberg*, 205 Mass. 319, 327; *John Hetherington & Sons, Ltd.* v. *William Firth Co.* 210 Mass. 8, 21.

The *quantum* of such prospective profits was not so speculative or uncertain as to preclude their recovery. *Chaplin* v. *Hicks*,

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[1911] 2 K. B. 786, 791, 795, 798. There was evidence of the actual receipts and expenditures during the time that the plaintiff was in possession. He testified as an expert to his opinion of what could be realized during the two following years and of the value of the leasehold estate in view thereof. Looking at the evidence of his knowledge and experience, we cannot say that this was wrong. The case comes well within the rule of *Gagnon* v. *Sperry & Hutchinson Co.* 206 Mass. 547, 556.

Doubtless it could not have been shown with absolute certainty that the plaintiff would have made any or what amount of profits. As in the case of almost any business, this would depend upon his ability to make a large number of other contracts of a more or less favorable character with other persons. A falling off in the number of visitors to Florida might turn an anticipated profit into a loss. All of his expectations might be disappointed from the happening of divers other contingencies. *Todd* v. *Keene*, 167 Mass. 157. *Fox* v. *Harding*, 7 Cush. 516, 522. But these considerations were of equal weight in many of the cases above cited, and are not decisive as matter of law, however they might have been regarded by the jury.

The defendant's twenty-first request was rightly refused. The offer of the Anthonys to the plaintiff to give him a new lease at a somewhat higher rent was made in April, 1910. The defendant was not bound to give a new lease to the plaintiff until June of that year. The plaintiff, in spite of the prophecy made to him of a breach of the defendant's agreement, had until the latter time a right still to expect that she would not allow her engagement to be violated, and was not bound to accept the earlier offer of the Anthonys for the sake of reducing the damages which otherwise he might claim. This was expressly decided in *Emory Manuf. Co.* v. *Salomon*, 178 Mass. 582. To the same effect see *Havemeyer* v. *Cunningham*, 35 Barb. 515.

The other exceptions need not be considered in detail. In the opinion of the majority of the court, none of them can be sustained.

Exceptions overruled.

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JAMES A. YOUNG *vs.* ALFRED S. HAYES & another.

Suffolk. March 27, 1912. — September 11, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Bills and Notes, Consideration, Conditional delivery. *Practice, Civil*, Election between counts. *Agency*. *Accord and Satisfaction*.

Under R. L. c. 73, § 42, a loan of money made to a person, who borrowed and used it for the joint benefit of himself and of other persons undisclosed, is a good consideration for the indorsement by one of such undisclosed persons of a note subsequently given to the lender and accepted by him in discharge of the obligation of the loan.

Although in an action on a promissory note by the payee against an indorser it can be shown in defense that by an agreement between the parties the defendant's indorsement was not to be binding until the note was indorsed by two other persons named, yet, where evidence to this effect is contradicted by evidence that the defendant signed the note as indorser unconditionally, the question of the credibility of the witnesses is for the jury and a request for a ruling that the plaintiff cannot recover must be refused.

In an action of contract the declaration contained a count on a promissory note by the payee against an indorser and a count for money lent to recover the same debt for which the note was alleged to have been given. The defendant contended that his indorsement of the note was conditional upon other indorsements being obtained and that the condition had not been performed, and there was conflicting evidence on this issue. The judge refused to rule that the plaintiff could not recover on the count for money lent or to order the plaintiff to elect on which count of the declaration he would rely, but ruled that if the jury found for the plaintiff on the count on the promissory note they could not find for him also on the count for money lent. The jury found for the plaintiff on the count on the note. *Held*, that the rulings were refused rightly, as before the verdict it could not be known that the jury would not find that the defendant's indorsement of the note was conditional, in which case the plaintiff would be entitled to rely on his count for money lent.

Evidence, that the lender of a sum of money knew that it had been borrowed for the purpose of providing for the joint purchase by four persons of a controlling interest in the capital stock of a certain corporation, that the lender knew that in some way the payment of the loan was to be secured, and that shortly afterwards the lender's son by his authority procured a note payable to the lender's order for the amount lent signed as maker by one of the four persons and indorsed by another of them and by the lender's son, is not evidence that the lender authorized his son to act as his agent in signing a subsequent agreement under seal relating to the joint enterprise, which was executed by the four persons engaged in the enterprise and by the lender's son in the son's own name.

In an action on a promissory note, which was given to the plaintiff for a loan of

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money made by him to be used for the purpose of procuring for certain persons a controlling interest in the capital stock of a corporation, it was held on the evidence to be a question of fact for the jury whether certain shares of the corporation in question held by the plaintiff had been accepted by him in satisfaction of his claim in accordance with the provisions of an agreement under seal, of which he knew although he was not a party to it, or whether the shares had been transferred to him independently of the agreement in compliance with a promise of the maker of the note as a bonus or premium for the loan.

CONTRACT in three counts. The first count was against Frederick J. Daggett as the maker of a promissory note for $2,000, dated June 10, 1903, and payable to the order of the plaintiff six months after date at any bank in Boston, "eighty shares of the Canadian Atlantic and Plant Steamship Company Ltd being put up as security." The second count was against Alfred S. Hayes as indorser before delivery of the same note. The third count, which was added by amendment, was against both Daggett and Hayes for $2,000 alleged to have been lent to the defendants on or about June 10, 1903, "upon their joint and several promises to repay the same on demand." The writ was dated November 11, 1909.

The note declared upon also was indorsed by James E. Young, who was not made a defendant, and there was indorsed on the note a payment of $1,420, received on account on June 3, 1910.

By an amendment to his answer the defendant Hayes alleged that, if he indorsed the note, he did so upon the agreement of James E. Young, acting as agent for the plaintiff, that the note should not be used and that the defendant should not be liable thereon unless and until the note had been signed or indorsed by one Charles E. Pye and one George E. Gale and that the note never was signed or indorsed by either of them. The defendant Hayes also alleged that there never was any consideration for his indorsement of the note.

By a further amendment to his answer the defendant Hayes set forth an agreement under seal dated June 16, 1903, executed by the defendants Hayes and Daggett and also by George E. Gale, Charles E. Pye and James E. Young, the last named being the son of the plaintiff, relating to an undertaking to raise money and purchase the stock of the Canada, Atlantic and Plant Steamship Company, Ltd., and alleged that James E. Young executed this agreement as the agent of the plaintiff, that this agreement

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superseded all other agreements and understandings between the parties to it and that the plaintiff was bound thereby, and therefore that the defendant was not liable on either count.

The agreement set forth in the amended answer was put in evidence at the trial and was as follows:

"Agreement made this sixteenth day of June, A. D. 1903, by and between Alfred S. Hayes, George E. Gale, Charles E. Pye, Frederick J. Daggett and James E. Young.

"Witnesseth:

"Whereas the above named parties entered into an undertaking to raise money and purchase the Canada Atlantic and Plant Steamship Company (Ltd.) and

"Whereas by the united efforts of the above named parties the total stock in said Company now issued, amounting to two thousand (2000) shares has been purchased by, and has been delivered to A. W. Perry, of Boston, to be held by the said Perry under a certain agreement in writing between him and the said Hayes, Gale, Pye and Daggett, and

"Whereas said Company is about to issue two thousand (2000) shares more of stock, making four thousand (4000) in all, and

"Whereas by the terms of said agreement with the said Perry, he is to hold three thousand (3000) shares of said stock, and

"Whereas the balance of one thousand (1000) shares of stock is to be sold or apportioned immediately; and the three thousand (3000) shares of stock to be apportioned when released by Perry.

"Now, therefore, in consideration of the above, and of mutual agreements and promises it is agreed as follows:

"1. The said one thousand (1000) shares of stock last mentioned above are to be used and apportioned as follows: Sixty (60) shares to George B. Bussey of Winthrop; sixty (60) shares to James A. Young, of Boston: of the remaining eight hundred and eighty (880) shares, there are to be taken what is required by law to be held by the Directors in said Company, viz: Ninety (90) shares. Of the balance thereafter remaining, there is to be taken whatever is necessary to sell, in order to raise the amount of $26,883.41 in cash, and $26,883.41 to be used to repay the amount supplied in order to negotiate and complete the purchase of the stock and land as above set forth, and is to be paid as follows:

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$6083.41 to A. S. Hayes
5400.00 to George E. Gale
5000.00 to Frederick J. Daggett
6300.00 to Charles E. Pye
2000.00 to James A. Young
2000.00 to G. B. Bussey
100.00 to E. C. Holman.

"Any balance then remaining is to be sold and the proceeds divided equally among the said Hayes, Gale, Pye and Daggett.

"2. When the notes held by the said A. W. Perry shall have been paid, or when his claim on the three thousand (3000) shares of stock held by him shall have been released, it is agreed that the two hundred shares of said stock shall be paid to W. A. Faulkner; one hundred and fifty shares to R. T. McIlreithe; twenty shares to William Mombequit; one hundred and seventy-four shares to J. E. Young; and forty shares to Curtis & Sederquist. The balance then remaining shall be divided into sixteen parts, and shall be distributed as follows: Alfred S. Hayes to have four of said parts, George E. Gale to have four of said parts, F. J. Daggett to have four of said parts, Charles E. Pye to have four of said parts.

"It is understood and agreed that upon the delivery to the said parties of the said stock, and the payment of the money as above, all claims against the said Company on account of services or expenses to the date of this instrument shall be deemed fully satisfied.

"It is further agreed that the interest of the said Hayes, Gale, Pye and Daggett to the extent of two thousand and four shares (2004) to be supplied by them in equal parts, shall be placed in a pool, and that the total of said shares shall be voted at any stockholders' meeting according to a majority vote of said pool, according to a pooling agreement to be more fully entered into in writing between said four parties; but until the notes of the said Perry shall have been paid, or his claim discharged, it is agreed that the interest of all the parties hereto in the stock of said Company shall be voted in such a manner that the Board of Directors shall always comprise the said Hayes, Gale, Daggett and Pye, and so that the Executive Committee shall consist of the said Hayes, Gale and Daggett, and so that further, the said Hayes shall remain Presi-

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dent of the Company, and the said Gale Managing Director, and the said Pye Vice President and Supervisor.

"Provided at any time the four members of the pool should be tied in the voting of the stock of the pool, it is agreed that the decision upon such question shall be left with Robert T. McIlreithe of Halifax, Nova Scotia, whose decision shall be final.

"Witness our hands and common seal on day and date first above mentioned.

"Alfred S. Hayes (Seal)
George E. Gale
Charles E. Pye
Frederick J. Daggett
James E. Young."

In the Superior Court the case was tried before *Hardy*, J. The defendant Daggett admitted liability, and by an agreement between him and the plaintiff a verdict was entered against him at the beginning of the trial on the first count in the sum of $1,417.80, being the balance due after a voluntary payment made by him before the trial, and the trial proceeded against the defendant Hayes on the second and third counts.

The uncontroverted facts and the facts which could have been found upon the plaintiff's evidence are stated in the opinion. At the close of the evidence the defendant Hayes asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover."

"3. Upon all the evidence the plaintiff is not entitled to recover on the second count of his declaration.

"4. Upon all the evidence the plaintiff is not entitled to recover on the third count of his declaration.

"5. The defendant moves that the plaintiff be ordered to elect upon which count of his declaration he will rely."

"7. If the jury find that the agreement of June 16, 1903, was intended as a culminating agreement, superseding all other agreements or arrangements between the parties, then the plaintiff is not entitled to recover provided you also find that James E. Young was acting for and in behalf of his father, and as his father's agent in signing said agreement."

"10. If the plaintiff, knowing or having reason to know of the

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agreement of June 16, 1903, accepted and still holds stock in accordance with said agreement, that is evidence that he ratified the same, and if he ratified the same, he is not entitled to recover under either count of his declaration."

The judge refused to make any of these rulings. At the close of his charge, the judge gave the following instruction in regard to the form of the verdict:

"In dealing with the counts here the counsel have kindly made up the amount of interest upon the claim and the clerk has made up here blank verdicts to be signed by the foreman upon the two counts — that is, if you find the defendant, Mr. Hayes, is not liable because of any joint liability here upon the third count, then you should give a verdict for Mr. Hayes on both counts. If you find that he is liable upon the third count, then you may consider how far this note was a valid note because it was delivered to the plaintiff, Mr. Young, without any condition. And if you find he is liable and a consideration exists here, in accordance with my instructions, your verdict should be on the second count for the plaintiff and a verdict for the defendant on the third count."

The jury returned a verdict for the plaintiff against the defendant Hayes upon the second count in the sum of $1,417.80. They returned no verdict upon the third count. The defendant alleged exceptions.

The case was argued at the bar in March, 1912, before *Rugg*, C. J., *Morton, Braley, Sheldon,* & *DeCourcy,* JJ., and afterwards was submitted on briefs to all the justices except *Loring,* J.

D. E. Hall, for the defendant Hayes.

A. D. Hill, (*J. E. Young* with him,) for the plaintiff.

BRALEY, J. The plaintiff sues to recover under the first count from the defendant Daggett, and under the second count from the defendant Hayes, the amount remaining due on a promissory note signed by them respectively as maker and indorser. By consent the jury returned a verdict for the plaintiff on the first count, and the trial proceeded on the second and third counts. The note having been delivered by the maker some days after the money had been received, and before the defendant indorsed, there was no consideration for the indorsement unless, as the plaintiff contended, the loan was procured for the benefit of the defendants jointly, even if the money had been lent in ignorance of any

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agreement between them. *Way* v. *Butterworth*, 108 Mass. 509. R. L. c. 73, § 42.

It seems to have been uncontroverted, that in association with one George E. Gale and one Charles E. Pye the defendants became interested in the acquisition by purchase of a controlling interest in the capital stock of a coastwise steamship company, but, lacking sufficient funds of their own, a large amount of money must be borrowed or the enterprise could not succeed. The efforts to interest those who could financially aid them were largely exerted by Hayes, to whom reference hereafter will be made as the defendant, and the needed assistance was obtained upon certain conditions, among which was the requirement that the four promoters should contribute in cash the sum of $25,000 as their proportion of the purchase price. They undertook to comply with this condition, and while from this point an irreconcilable conflict in the evidence arises, the jury from the testimony introduced by the plaintiff would have been warranted in finding, that after each promoter had contributed the part allotted to him there remained to be raised a balance of $4,000, which would have to be borrowed. It then was mutually understood and agreed that Daggett should act for them, and he was authorized to hire the money in their behalf, and as an inducement to obtain a loan to offer the lender a gift of shares of its stock upon their attainment of control of the corporation. When he borrowed from the plaintiff one half of the required amount he did not disclose the names of his associates or state that he represented a syndicate, but, the money having been transmitted to the defendant, it was used for their joint benefit. If the note declared on had not been subsequently asked for, given and accepted, the defendant could have been sued as an undisclosed principal when the plaintiff discovered his liability. *Byington* v. *Simpson*, 134 Mass. 169. But presumptively the loan had been paid by the note, and, the defendant having been responsible jointly for the debt, there was sufficient consideration to support his promise as indorser, and it is immaterial whether he indorsed before or after the note had been delivered to the plaintiff's agent. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89, 94. R. L. c. 73, §§ 41, 42.

A promissory note, however, as between the parties takes effect only upon its unconditional delivery, and if, as the defendant con-

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tended and testified, it was understood that his indorsement should not be binding until the signatures of Gale and Pye also had been secured, his third request would have been appropriate. *Watkins* v. *Bowers*, 119 Mass. 383. *Barrie* v. *Quinby*, 206 Mass. 259, 263. But as the plaintiff's son, James E. Young, who acted as his agent in procuring the note and the indorsement, testified that the defendant signed unconditionally, the credibility of the witnesses rested with the jury, and the refusal of this request is not ground for exception.

A third count declaring for money lent having been allowed as an amendment at the trial, the defendant asked at the close of the evidence for rulings that the plaintiff could not recover on this count and that the plaintiff be ordered to elect the count on which he finally relied. The jury if they found for the plaintiff on the second count should have found for the defendant on the third count, and while so instructed they probably failed to apply accurately the distinctions pointed out as applicable to the different counts, but, under the defense that the indorsement had been obtained on the condition stated, the plaintiff until a verdict had been rendered could rely on the count for money lent, and no inconsistency is apparent. *National Granite Bank* v. *Tyndale*, 176 Mass. 547. *Mullaly* v. *Austin*, 97 Mass. 30, 33, 34. *Holman* v. *Updike*, 208 Mass. 466, 471. The jury could not properly have been instructed as asked for in the fourth and fifth requests, and only the questions involved in the refusal to give the seventh and tenth requests remain.

The plaintiff lent the money originally on the credit of the maker, and, when he sent him a check for the amount, the jury would have been justified in finding from the plaintiff's evidence that he was cognizant of the purpose for which it had been borrowed and that the plaintiff and Daggett understood that in some form payment of the loan was to be secured. Very shortly after this the plaintiff requested his son to procure a note, or as he testified he had talked with his son "and left things to him to take care of," and gave him authority "to look out for me." The scope of the agency at the time of employment seems to have been limited to the business to be transacted, namely, the procurement of a note from Daggett, and, the agreement under seal pleaded in bar of the action by the amended answer not having been executed

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in the name of the plaintiff, or by his authority, the seventh request could not have been given. *Brinley* v. *Mann*, 2 Cush. 337. *Sherman* v. *Fitch*, 98 Mass. 59. *First Baptist Church of Sharon* v. *Harper*, 191 Mass. 196.

The plaintiff, however, is named, and the debt due to him is described as included in the outstanding liabilities of the promoters which were to be liquidated from sales of shares of stock they had acquired, and it is signed by James E. Young, who was not a member of the syndicate, although recognized in the instrument after the indebtedness had been paid as entitled to a certain number of shares. It was the plaintiff's contention, that, although the number of shares he received corresponded with the number named in the agreement, they were transferred to him independently of its terms, and in compliance with the promise of Daggett, as a bonus or premium for the loan. The reasonableness and effect of this explanation was submitted to the jury. In their consideration of the question they were instructed in substance to consider the agreement and determine whether the plaintiff relied on the personal liability of the defendant or agreed to accept in satisfaction of his demand the proceeds from future sales of stock, the value of which very largely might depend upon the success of the enterprise. The true nature of the dealings between the parties depended upon conflicting evidence, and if the transaction remained a loan represented by the note, as the verdict shows the jury found, the judge rightly declined to rule in the language of the tenth request that by acceptance of the stock the plaintiff had ratified the agreement and engaged thereafter to look solely to the sales of outside stock for reimbursement. *Gleason* v. *Saunders*, 121 Mass. 436. *Garant* v. *Cashman*, 183 Mass. 13, 17, 18.

Exceptions overruled.

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ARTHUR E. BURR, trustee, *vs.* COMMONWEALTH.

Suffolk. May 22, 1912. — September 12, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Damages, In contract: interest. *Interest*, Claimed as damages. *Commonwealth. Interpleader. Tender. Waiver.*

On a petition by the trustee in bankruptcy of a contractor under R. L. c. 201 to recover a balance due to the bankrupt under a contract made with officers or agents of the Commonwealth for the construction of a public building, the Commonwealth admitted its liability for the amount named in the petition subject to the claims for labor and materials which had been filed in compliance with the requirements of R. L. c. 6, § 77. The contract contained a provision that the Commonwealth should have the right to retain an amount sufficient to indemnify it against such claims and the bond given by the contractor provided that the Commonwealth should retain the last payment until the discharge of all liens for such claims. By agreement of the petitioner, the Commonwealth and the claimants the amount of the claims without interest was paid to the claimants, leaving a small balance which the Commonwealth offered to pay to the petitioner. The petitioner contended that he was entitled to interest on the amount of the whole balance before the payment of the claims from the date of the filing of the petition to the date of such payment. *Held*, that there was no unlawful withholding from the petitioner of the unpaid balance of the contract price, which it was the duty of the Commonwealth to hold in trust as security for the claims filed under R. L. c. 6, § 77, and that this duty included the retention of the small balance left after the payment of the claims which would have been needed to pay the claims if the interest due on them to the time of settlement had been paid.

Upon a petition of interpleader filed under R. L. c. 173, § 37, by the defendant in an action of law, or by the respondent in a petition in the nature of an action at law, the defendant or respondent by admitting his liability for the amount claimed subject to the claims of other persons named as claimants, without making a payment into court, does not make himself liable for the payment of interest for which he otherwise would not be liable.

On a petition under R. L. c. 201 by a contractor against the Commonwealth to recover the balance due on a contract for the construction of a public building, the Commonwealth admitted its liability for the amount named subject to claims for payments for labor and materials filed under R. L. c. 6, § 77, and by agreement of the petitioner, the Commonwealth and the claimants the claims were paid without interest, leaving a balance due to the petitioner. The case was heard by a judge upon an agreed statement of facts, with the right to draw inferences. The agreed facts stated that after the payment to the claimants there remained in the hands of the Commonwealth the sum of about $550, which the Commonwealth "thereupon offered to pay to the petitioner, and has been at all times willing to pay to the petitioner unconditionally, and still

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stands ready to pay." No payment into court was made. The petitioner contended that he was entitled to interest upon this balance from the time of the payment of the claimants to the time of judgment. The judge found that the petitioner was entitled to no interest. *Held*, that, even if the strict doctrine of tender was applicable as against the Commonwealth in a case of this character, the judge would be warranted in inferring that an actual tender or further steps toward it had been waived by the petitioner, and that therefore it did not appear that in disallowing interest on such final balance any error of law had been made.

PETITION, filed in the Superior Court on January 10, 1907, and amended on April 3, 1907, by the trustee in bankruptcy of the H. P. Cummings Company, a corporation, under R. L. c. 201 to recover a balance of $7,732.68 alleged to be due to the petitioner for the construction of a building at Foxborough under a contract between the petitioner's bankrupt and the Commonwealth as represented by the board of trustees of the Foxborough State Hospital.

On April 16, 1907, the Commonwealth filed a petition under R. L. c. 173, § 37, admitting its liability and that the amount thereof was not disputed, alleging that the amount was claimed by persons other than the petitioner and that the Commonwealth had no interest in the subject matter of the controversy, stating the names and residences of all known claimants and praying that they might be made parties.

The case was submitted to *Jenney*, J., upon an agreed statement of facts, which stipulated that the court should be at liberty to draw inferences of fact from the facts stated and that the pleadings might be referred to.

The material provisions of the contract between the petitioner's bankrupt and the trustees of the Foxborough State Hospital, acting as officers or agents of the Commonwealth, and also the material provisions of the bond given by the bankrupt are described in the opinion.

At the time of the filing of the petition the Commonwealth held in its possession the sum of $7,732.68, which at that time would have been payable to the petitioner if claims for payment for materials and labor had not been filed in compliance with the requirements of R. L. c. 6, § 77. On March 24, 1910, in accordance with an agreement entered into by the petitioner, the claimants and the Commonwealth, the Commonwealth paid to the claim-

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ants the principal of the amounts of their respective claims, without interest, amounting to $7,175.02, and the claimants gave to the Commonwealth and to the petitioner full and absolute releases of all claims on account of work done or furnished or materials furnished by them under the contract. After the payment of such claims there remained the sum of $557.66 in the hands of the Commonwealth as due the petitioner under the contract, which the Commonwealth thereupon offered to pay to the petitioner and thereafter at all times was willing to pay to the petitioner. The Commonwealth paid no money into court.

The petitioner contended that, in addition to the sum of $557.66 offered by the Commonwealth, he was entitled to interest on $7,732.68, from the date of the filing of the petition on January 10, 1907, to the date of the payment of the claims on March 24, 1910, amounting to $1,487.39, and that he also was entitled to interest on $557.66 from March 24, 1910, to the date of judgment.

The judge found and ruled that the petitioner was entitled to recover $557.66, and that he was not entitled to interest on that amount or to any interest on any other amount. A judgment was entered in accordance with this finding and ruling, and the petitioner appealed.

The case was submitted on briefs.

A. E. Burr, pro se.

J. M. Swift, Attorney General, *& A. Marshall,* Assistant Attorney General, for the Commonwealth.

HAMMOND, J. This case was submitted to the Superior Court on the pleadings and an agreed statement of facts, with the right in the court to draw inferences of fact from the facts stated; and the case is before us upon the petitioner's appeal from the final judgment entered in accordance with the finding and ruling of the court disallowing interest. The only questions relate to the matter of interest.

1. As to the claim for interest on the unpaid balance of the contract price from January 10, 1907, the date of the filing of the petition, to March 24, 1910, when the claimants were paid.

The petitioner contends in substance that upon the pleadings and the agreed statement of facts the respondent at the time of the filing of the petition owed to him the balance then unpaid, that the payment to the claimants was made on his account, and that

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the usual rule that judgment is given for the amount due with interest thereon from the date of the writ, less payments on account, should be applied to this case.

But this contention is based upon an erroneous conception of the situation. There was no provision in the contract for the payment of interest, and hence interest can be allowed only as damages for a breach of the contract, or in other words for the wrongful withholding of the sum unpaid. The fundamental principle lying at the bottom of this question of interest in cases where it is claimed as damages for breach of contract is stated by Putnam, J., in *Dodge* v. *Perkins*, 9 Pick. 368, 386, as follows: "The great inquiry is, whether the party has done all that the law required of him in the particular case; whether acting on his own account, or as agent, executor, administrator, guardian or trustee for others. If he has, he is not accountable for interest; if he has not, he is accountable for it as a compensation for the non-performance of his contract." Accordingly, as a general rule it is well settled that when a debtor has been restrained by judicial proceedings, as for instance by trustee process, legal or equitable, interest does not run against him as damages during the continuance of the restraint. *Smith* v. *Flanders*, 129 Mass. 322, and cases cited. *Norris* v. *Massachusetts Mutual Life Ins. Co.* 131 Mass. 294, and cases cited.

In the present case there was no unlawful withholding from the petitioner of the unpaid balance. It is a legitimate inference from the agreed facts that the amount due from the petitioner to the various claimants for work and materials was equal to the amounts finally paid to them without interest, or nearly the whole of the unpaid balance. The respondent held this balance under the law as trustee for the claimants. They had an equitable lien upon it which had priority over any interest of the petitioner. R. L. c. 6, §§ 77, 78. *Commonwealth* v. *Nash*, 174 Mass. 335. *Burr* v. *Massachusetts School for the Feeble-Minded*, 197 Mass. 357. And it was not only the right but the duty of the respondent to hold it as security for them. Moreover by Article IX of the contract the contractor, in whose shoes the petitioner stands, agreed that the respondent should have the right to retain out of any sum due or to become due an amount sufficient to indemnify it against such claims. And the bond given by the contractor with surety

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provided that the respondent should "retain the last payment and reserve due . . . [the contractor] . . . until the complete performance by . . . [the latter] . . . of all the terms, covenants and conditions of the contract on . . . [its] . . . part to be performed and until the expiration of the time within which liens or notices of liens may be filed, . . . and until the cancellation and discharge of such liens, if any." Under the circumstances of this case the term "liens" must be held to include claims filed under R. L. c. 6, §§ 77, 78. The balance was not unlawfully withheld from the petitioner, but was held in obedience to the duty imposed upon the respondent by law as the trustee for the claimants, and with the consent of the contractor as previously given in the contract and in the bond.

And this was so, even if after the settlement with the claimants there was a small balance due the petitioner. The provision of the contract was that the respondent should hold an amount sufficient to indemnify it against such claims. It is to be observed that the amount to be paid on these claims was not determined by the court, but was agreed to by all parties, and that in accordance with the agreement no interest was allowed. The fair inference from the facts agreed is that interest was legally due on these claims and that if it had been allowed up to the time of settlement the whole unpaid balance would have been needed to pay them. The respondent could not know how long the claims would remain unpaid, nor precisely what would be the amounts when paid. It had the right to withhold sufficient to indemnify it and it had the right, acting in good faith, to take into consideration the various contingencies as to the time when the claims would be paid and the sums which reasonably might be expected to be due when they finally should be established against the fund. It does not appear that in this matter the respondent went beyond the fair construction of the contract. No part of the unpaid balance having been unlawfully withheld up to the time of the payment to the claimants, the contention of the petitioner that he should be allowed for interest before that time, so far as based upon damages for breach of contract, cannot be sustained.

It is argued by the petitioner, however, that by reason of the respondent's answer the proceeding became one of interpleader under R. L. c. 173, § 37, and that it was the right of the respondent

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under that statute, either to bring the unpaid balance of the contract price into court and cease to be a party to the action, in which case it would be no further answerable either for principal or interest, or, not bringing the fund into court, to remain a party and take the consequences; and that one of the consequences is a liability to pay interest upon whatever sum is finally named. It is manifest, however, that the object of the statute so far as respects interest was not to create a new or additional liability for interest, but to relieve the respondent from a liability which but for the statute would be upon him. This relief was afforded by allowing the respondent to pay the money into court for the benefit of whomsoever it might concern.

It follows that the claim for interest from the date of the filing of the petition to the payment of the claims was properly disallowed. There is nothing inconsistent with this conclusion in cases like *Converse* v. *Ware Savings Bank*, 152 Mass. 407, and *Moore* v. *Washburn*, 159 Mass. 172, cited by the petitioner.

2. As to the interest upon the balance found to be due to the petitioner after the payment to the claimants from the time of such payments to the time of judgment.

This claim for interest, as distinguished from the general claim for interest upon the whole unpaid balance, is not much noticed upon the petitioner's brief, although it seems to be insisted upon. It appears from the agreed facts that after the payment to the claimants there remained in the hands of the respondent the sum of $557.66, which the respondent "thereupon offered to pay to the petitioner, and has been at all times willing to pay to the petitioner unconditionally, and still stands ready to pay." It further appears that in the written agreement under which the respondent paid the claimants, which was signed by all parties including the petitioner, there was a stipulation that the payments were "made without prejudice to the rights of either the plaintiff or the respondent, . . . so far as the question is concerned as to whether the respondent is liable to the plaintiff for interest from the date of the filing of the petition upon the principal sum claimed." The trial judge was empowered to draw inferences of fact, and, even if the strict doctrine of tender be applicable as against the Commonwealth in a case like this, we are of opinion that under the circumstances he would be warranted in inferring that such a

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tender, or any further steps to it, of the sum found to be due to the petitioner after the payment to the claimants had been waived by him. It therefore does not appear that in disallowing this interest any error of law was made. Let the order be

Judgment affirmed.

HENRY A. WESTALL *vs.* MILLIDGE B. WOOD.

Suffolk. June 17, 1912. — September 12, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, To enforce equitable lien. *Mortgage*, Of real estate. *Lien*, Equitable. *Equity Pleading and Practice*, Parties.

An equitable lien on personal property, as between the parties to it, may be established by showing an arrangement between the parties which in the light of the circumstances indicates a contemporaneous intention to adjust their rights upon the basis of such a lien, without proof of an express agreement that there should be such a lien.

A purchaser of land, who had mortgaged it to secure a loan of money to be advanced from time to time for the purchase price of the land and the erection of a building thereon, asked the mortgagee to accept an order for the price of lumber to be used in the construction of the building, stating that he could not get the lumber without such an order. Upon the demand of the mortgagee the mortgagor agreed in the presence of the lumber dealer that the lumber to be delivered should be used in the construction of a building on the mortgaged land and the mortgagee thereupon accepted an order to pay for the lumber. It was agreed that the money so paid by the mortgagee should constitute a part of the consideration of the mortgage, but there was no express agreement that the lumber should be subject to a lien for the price. The mortgagee paid for the lumber, which was delivered on the land, but a large part of it was removed by the mortgagor and was claimed by him as unincumbered property. In a suit in equity by the mortgagee against the mortgagor, it was *held*, that the circumstances clearly showed an intention of the parties that the lumber paid for by the plaintiff should become subject to the lien of the mortgage, and that equity would enforce such lien.

In a suit in equity to establish and enforce an equitable lien upon certain building materials as part of the security of a mortgage of real estate, where it appears that the plaintiff has caused an assignment of the mortgage to be made to a person in his employ who holds it exclusively for the plaintiff's benefit, such assignee is a necessary party to the suit and a decree granting relief will not be made until he has been joined as a party.

BILL IN EQUITY, filed in the Superior Court on December 19, 1911, and amended on February 9, 1912, to enforce an equitable

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lien on certain lumber in the hands of the defendant as security for the sum of $584.28 paid by the plaintiff upon an order drawn by the defendant upon the plaintiff in favor of the Hutchinson Lumber Company and accepted by the plaintiff under the circumstances stated below.

The case was heard by *Jenney*, J., who found the following facts:

On October 21, 1911, the defendant gave a mortgage dated September 15, 1911, to one Collamore and others, trustees for the First Parish in Pembroke. This mortgage was given upon land in Saugus to secure a construction loan for $2,200. A dwelling house was to be constructed upon the mortgaged premises. The plaintiff acted as the agent of the trustees in negotiating the mortgage and in all things done under the mortgage while the trustees remained its owners. The defendant knew that the plaintiff was such agent. At or about the time of the execution of the mortgage, the trustees placed the entire consideration thereof in the plaintiff's hands to advance for them as the building progressed. The plaintiff personally entered into a written contract with the defendant as to the manner of advancing the consideration of the mortgage as the house progressed. The plaintiff agreed with the trustees that he was to be responsible to them for the advancing of the consideration of the mortgage and for the sufficiency of their security under it. After the filing of the bill the plaintiff paid to the trustees the amount of their loan and took an assignment of the mortgage to one Jessie A. Stickney, a person in his employ, who at the time of the finding held the title to it exclusively for the plaintiff's benefit.

At the time of the execution of the mortgage the plaintiff advanced to the defendant $400 on account of the mortgage loan. This was the entire amount paid by the defendant for the conveyance of the land to him, which was simultaneous with the execution of the mortgage, and the $400 so advanced was paid by the defendant for the deed to him. Afterwards, before the filing of the bill, the plaintiff advanced to the defendant $200 more on account of the mortgage and the construction contract.

At the time of the execution and delivery of the mortgage the defendant asked the plaintiff to sign an order making the plaintiff responsible to the amount of $600 for lumber and other materials

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to be used in the construction of the house. The plaintiff and the defendant together went to the office of the Hutchinson Lumber Company. A list of materials desired for use in the construction of the house was delivered by the defendant to that company and the plaintiff accepted the order mentioned above and delivered it to the company. At the time the defendant asked the plaintiff to accept this order, and before going to the office of the company, the plaintiff told the defendant that he would have to be assured that the materials if delivered would be used on the mortgaged premises, and the defendant agreed that the materials should be so used. The defendant further told the plaintiff that he had no credit that would enable him to get the materials without the order. At the office of the lumber company the plaintiff and the defendant agreed that the materials delivered, for which the plaintiff was to be responsible under his order, were to be delivered on the mortgaged premises and used in the construction of the building to be erected thereon under the contract between the plaintiff and the defendant. It was not specifically agreed that the plaintiff or the mortgagees should have a lien or claim upon the materials furnished under and by virtue of the contract or mortgage. The amount paid by the plaintiff under the order was to constitute a part of the consideration of the mortgage. The lumber company agreed also to deliver the materials on the mortgaged premises. It delivered the materials to the defendant, charging them to his account, but relying on the plaintiff's order as rendering him responsible for the payment therefor. The materials delivered were of the value of $584.28. The title to these materials passed to the defendant. They were delivered on the premises described in the mortgage or upon vacant land adjoining, and on December 26, 1911, the plaintiff paid the lumber company $584.28 in settlement of his liability under the order.

The defendant had begun the construction of the house on the mortgaged premises before the execution of the mortgage. After the execution of the mortgage he substantially completed the cellar, placed the sills and timbers of the first floor and laid part of the under floor thereon. He used a part of the materials purchased as aforesaid in this work. A part of the remainder of the materials was prepared by him to be fitted for use in the frame of the building but never was placed in position. Some of the mate-

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rials were placed by the defendant for safe keeping in the cellar of another house owned by him.

On November 10, 1911, the defendant negotiated a second mortgage through the plaintiff with the trustees for $750. This mortgage covered the premises described in the mortgage already referred to, and also other premises. This second mortgage was assigned to Stickney, who held it solely for the benefit of the plaintiff, and the plaintiff paid the entire consideration for the assignment thereof. On December 2, 1911, after this assignment, Stickney at the request of the plaintiff took possession of the premises described in the second mortgage, for alleged breach of its conditions. The defendant thereupon stopped work upon the building, and at the time of the filing of the bill was in possession of all the materials delivered under the order except such part thereof as had been used in the construction of the building. He claimed such materials as his own, free from any trust or other claim. The plaintiff contended that the materials were in equity liable as security for the first mortgage.

The judge found that the materials held by the defendant were impressed with a trust in the nature of a lien to secure the amount due on the first mortgage, and that the plaintiff was entitled to have a decree entered to that effect, with such incidental orders as might be required to effectuate that result.

A final decree was entered, declaring that the lumber was impressed with a trust in the nature of an equitable lien as security for the amount due under the first mortgage, and that, upon failure by the defendant to pay to Jessie A. Stickney, the assignee and holder of the mortgage for the benefit of the plaintiff, the sum of $733.35, being the balance due on such mortgage above the amount of $550 realized at the foreclosure sale, a special master was appointed to sell the lumber by public auction and out of the proceeds to satisfy Jessie A. Stickney, as the assignee and holder of the mortgage, and to pay any balance to the defendant.

The defendant appealed.

The case was submitted on briefs.

C. N. Barney & H. T. Lummus, for the defendant.

W. F. Porter, for the plaintiff.

RUGG, C. J. The defendant executed and delivered a mortgage on real estate. It was agreed that the amount to be lent

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on the mortgage should be advanced from time to time to pay for the purchase price of the land and for the erection of a building thereon as its construction progressed. At the time of the execution and delivery of the mortgage, the defendant requested of the mortgagee an order to enable him to buy materials for the building, stating that he had no means to get them without an order. The mortgagee demanded assurance that the materials, if so procured, should be used on the mortgaged premises, and the defendant agreed that they should be so used. The defendant and a representative of the mortgagee then went to the office of a lumber company, where again it was agreed that the materials to be delivered should be used in the construction of a building upon the mortgaged premises. Thereupon a list of the required material was delivered to the lumber company, and the representative of the mortgagee accepted an order by the defendant to pay therefor. It was agreed further that the money so paid should constitute a part of the consideration of the mortgage, but there was no specific engagement that a lien for the price should attach to the material. The material was delivered upon the land, but later the defendant removed a large part of it, which he now claims to hold as his own free from any adverse right.

1. It is plain that an express agreement between the parties to the effect that a charge in the nature of a lien in favor of the mortgagee should attach to the materials so bought would be valid and enforceable in equity against the parties and their privies, and others who are volunteers or who take with notice. *Pinch* v. *Anthony*, 8 Allen, 536. See *Providence Bank* v. *Benson*, 24 Pick. 204, 210. But an equitable lien does not of necessity rest exclusively upon an express agreement. It may arise from circumstances of such nature as to require the presumption upon general considerations of justice as between those conducting commercial transactions according to a reasonable standard of integrity that an equitable lien was meant. Equity looks at the substance, and not at the form. If the arrangement between the parties, interpreted in the light of the conditions in which they were placed, indicates a contemporaneous intention to adjust their rights upon a basis which can be established only by resort to the equitable principle of lien or pledge, then, in the absence of an intervening adversary interest, such an intent will be executed

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in chancery. *Hurley* v. *Atchison, Topeka & Santa Fe Railway*, 213 U. S. 126. *Society of Shakers at Pleasant Hill* v. *Watson*, 15 C. C. A. 632, 639; 68 Fed. Rep. 730. *Schermerhorn* v. *Gardenier*, 107 App. Div. (N. Y.) 564, affirmed 184 N. Y. 612. *Dufur Oil Co.* v. *Enos*, 59 Ore. 528. *Garrison* v. *Vermont Mills*, 154 N. C. 1. *Connolly* v. *Bouck*, 98 C. C. A. 184; 174 Fed. Rep. 312.

The irresistible conclusion from the facts disclosed upon this record is that the parties intended that the materials furnished by the lumber company to the defendant should become subject to the lien of the mortgage. Their conduct and conversation forbid the inference that the purchase and delivery of the materials constituted an independent enterprise, which was to stand or fall by itself. They show rather that the main purpose of the loan was to enable the defendant to build a house upon his land, but as ancillary to that main purpose (he being without money, credit or ability to procure in the market the material for a house) that the credit of the mortgagee was extended to the end that the defendant might go forward in the prosecution of his plan. The material so purchased was to be delivered upon the land and attached to it as a part of the building. The understanding was that the material should never go off the land, but should continue upon the land and become a part of the real estate. This was not expressed with such accuracy in the device adopted by the parties that it can be enforced in an action at law, but, there being no doubt as to their real object, even though inartificially expressed, it ought to be treated in a chancery court as creating an equitable lien, in order to effectuate the aim of the parties and to prevent the perpetration of a fraud. *Sexton* v. *Kessler & Co.* 225 U. S. 90, 96, 97. Something more is found here than a mere isolated stipulation to apply certain property to a stated use. The fundamental agreement was the advancing of money to the defendant to be secured by a mortgage upon land in order that he might build a house thereon. The particular arrangement was subsidiary to that dominant design from which it took its color. The mortgagee had no intention of advancing money or credit, except upon the security of the mortgage, and the defendant does not contend that he had any agreement for obtaining money from the mortgagee except upon that security. The mortgage had been duly executed and delivered, and, at the time the mortgagee

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became obligated to pay for the materials, both parties must have supposed, if they were acting with common honesty, that the incident constituted an advancement of money upon the strength of their pre-existing agreement under the mortgage. *Falmouth National Bank* v. *Cape Cod Ship Canal Co.* 166 Mass. 550, and *Elmore* v. *Symonds*, 183 Mass. 321, are distinguishable in their facts, although both these cases recognize the doctrine of equitable lien.

2. The entry by the mortgagee for the purpose of foreclosing the mortgage is an immaterial circumstance upon the facts found by the Superior Court. It affords no defense to this suit. It does not appear that the condition had not been broken. At all events, it must be assumed that the entry was made lawfully.

3. According to the finding of facts, the title to the mortgage is held exclusively for the plaintiff's benefit by an employee named Stickney. But Stickney is not a party to these proceedings, and may not be bound by the finding. She is, however, a necessary party. Complete justice cannot be done to the parties before the court without her. If the decree entered in the Superior Court should be affirmed, she would not be barred from asserting claims under the mortgage against the defendant. Under these circumstances, this court may decline to proceed to final decree at this stage. *Northampton National Bank* v. *Crafts*, 145 Mass. 444, 447. Stickney should be joined as a party, and the decree must be reversed for this purpose. If she is so joined and waives the right to be heard, within twenty days from the date of this rescript, a new decree may be entered in form the same as that appealed from, together with costs of this appeal. Otherwise, the cause is to stand for further hearing upon issues raised by Stickney.

So ordered.

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INHABITANTS OF ENFIELD *vs.* CAROLINE D. WOODS, executrix.

Hampshire. September 19, 1911. — September 13, 1912.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, To enjoin irreparable injury to real estate. *Superior Court*, Jurisdiction in equity. *Adverse Possession. Evidence*, Of adverse possession, Of reputation or tradition as to matters of public or general interest. *Equity Pleading and Practice*, Findings of master.

St. 1904, c. 448, which transferred from the Superior Court to the Land Court jurisdiction in the proceedings relating to real estate there enumerated of which the Superior Court had exclusive jurisdiction, did not take away from the Superior Court its jurisdiction, concurrent with that of the Supreme Judicial Court, over suits in equity to enjoin irreparable injury to real estate in which the title to the real estate is put in issue.

For the purpose of proving a title to land by adverse possession evidence of a gift of the land by parol is competent to show the character of the possession.

Under the exception to the rule against hearsay which allows the admission of evidence of a general or common reputation as to a matter of public or general interest, upon the issue whether a town had acquired title to a tract of land for use as a common by adverse possession which began by a parol gift, a witness seventy-eight years old may be allowed to testify that his grandmother came to the town in 1802 and died in 1857, and that he had heard her "and the rest of the old people talk about it and say" that a certain person gave the common to the town; and in connection with this evidence another witness may be allowed to testify that his father, who died in 1908 at the age of seventy-eight, told him that the witness's grandfather said that the person in question gave this piece of land to the town for a common.

In a suit in equity by a town to enjoin the defendant from removing a soldiers' monument erected by the town from a lot of land used by the town as a common, to which the defendant claimed title, the plaintiff's case was that it took possession of the land under a parol gift made in 1814 and had held exclusive adverse possession of it ever since. The defendant's case was that her husband had acquired title to the land by adverse possession which began in 1884 and lasted until the soldiers' monument was erected by the plaintiff in 1907, in which year the defendant's husband died. A master, subject to the defendant's exception, "admitted evidence offered by the plaintiff from the valuation lists of the town from 1875 down through all the years, showing that the town common was noted on the books of the assessors as town property and exempt under the law." *Held*, that it was competent for the plaintiff to show that throughout the twenty-three years during which the defendant contended that her husband was in exclusive adverse possession of the land he never paid a tax upon it, and that this could be shown by introducing in evidence the "valuation lists" by which it appeared that no tax had been assessed to any one upon the land during those years.

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In a suit in equity by a town founded on the plaintiff's title to a tract of land used by it as a common, which the plaintiff contended that it had acquired by adverse possession, a finding by a master "that the town . . . its selectmen and citizens generally have laid claim to said land as the property of the town . . . ever since a time prior to the year 1814" is a finding that the claim was asserted by corporate action, if such action was necessary.

BILL IN EQUITY, filed in the Superior Court on June 9, 1908, by the town of Enfield against Caroline D. Woods, the sole devisee under the will of her late husband Cyrus F. Woods, to enjoin the defendant from removing a soldiers' monument from a parcel of land of about three quarters of an acre known as the "Common," alleged to belong to the plaintiff and to have been acquired by an open, adverse and uninterrupted possession and use and occupation by the plaintiff of more than ninety years.

The answer alleged ownership of the land by the defendant. The defendant afterwards filed a plea to the jurisdiction of the court, alleging that the case was within the exclusive jurisdiction of the Land Court.

The case was referred to John C. Hammond, Esquire, as master. The facts found by the master which are material to the questions of law before this court are stated in the opinion. The master found that the fee of the land was in the plaintiff and that the defendant had no right, title or interest therein.

Later the case was heard by *King*, J. He made an interlocutory decree, overruling the defendant's plea to the jurisdiction, overruling the defendant's exceptions to the master's report "excepting only the master's finding that the plaintiff acquired title to the land and premises in question by parol gift from Robert Field," and otherwise confirming the master's report.

The judge made a final decree, adjudging that the plaintiff was the owner of the parcel of land known as the "Common" on which the plaintiff had erected a soldiers' monument, enjoining the defendant from interfering with the monument or the common, and giving the plaintiff costs. The defendant appealed from the decree.

The case was submitted on briefs.

E. H. Lathrop, for the defendant.

J. H. Schoonmaker, for the plaintiff.

LORING, J. This case is before us on an appeal from a decree in favor of the plaintiff after all but one of the defendant's excep-

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tions to the master's report had been overruled and after a plea to the jurisdiction also had been overruled.

The bill is brought by the town of Enfield as owner of the fee in a lot of land called the "Common," to enjoin the defendant (who claimed to own the land) from removing from it a soldiers' monument erected pursuant to a vote of the town.

The plea to the jurisdiction is based on the theory that St. 1904, c. 448, took away from the Superior Court its jurisdiction as a court of equity to enjoin irreparable injury to land if the title to it is put in issue in the cause. But the scope of that act does not go so far. It is confined to transferring from the Superior Court to the Land Court jurisdiction in case of writs of entry under R. L. c. 179, petitions to require the bringing of an action to try title under R. L. c. 182, §§ 1–5, petitions to determine the validity of incumbrances under R. L. c. 182, §§ 11–14, and petitions to discharge mortgages under R. L. c. 182, § 15. In all these cases the Superior Court had exclusive jurisdiction before the enactment of this act. But of such a bill as the bill in this suit the Supreme Judicial Court as well as the Superior Court had jurisdiction before St. 1904, c. 448. The jurisdiction of neither court in suits like that now before us was affected by the act.

The master found that the plaintiff "town did acquire by parol gift a title to said 'Common' including the land in dispute at a time before the year 1814, and thereafter for a period of seventy years and more the town continued in open, uninterrupted possession with claim of right disputed by no one." He found that the defendant's claim to be the owner of the land in question depended (first) upon a deed to Cyrus F. Woods (her predecessor in title) made in 1884; this he found and ruled did not as matter of description cover the locus; (second) on a deed to the defendant from one Woods and one Towne, made in 1908, which as matter of description did cover the locus but which he found was inoperative because the grantors had no title; and (third) on adverse possession by Cyrus F. and the defendant since 1884. Upon the adverse possession of the plaintiff town and of the defendant and her predecessor in title the master made these two additional findings: "I find that the town of Enfield, its selectmen and citizens generally have laid claim to said land as the property of the town of Enfield ever since a time prior to the year 1814.

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It was used for gatherings on public occasions and for a recreation ground for the younger people playing games. After he, Cyrus F. Woods, acquired title in 1884 he did at times make claim that his title extended to the main highway and included the tract in dispute. He did not have any open, uninterrupted, adverse possession. He did not exclude the town of Enfield, or the general public, for any substantial period of time. The contention of the defendant that Cyrus F. Woods held title by adverse possession is not sustained. I find that he did not have title by adverse possession." "I find the fee and title to the land is in the plaintiff the town of Enfield and that the defendant has no right, title or interest therein."

The exception sustained by the Superior Court was to the finding of the master "that the town did acquire by parol gift title to said 'Common,' including the land in dispute, and at a time before the year 1814." If that had stood by itself it would have to be construed to mean that the fee in land can pass by word of mouth; if that is what the master should be taken to have ruled this exception was rightly sustained. But taking these words in connection with what follows we should have been inclined to construe it to be a finding that the plaintiff had acquired title by adverse possession under a parol gift, which possession had lasted for seventy years before the defendant's claim of title by deed or adverse possession began in 1884. Later on in his report there is a further statement by the master which makes it plain that this is what he meant. In dealing with one of the defendant's requests for rulings the master said: "I have found as a fact based on all the evidence, that the town, as early as the year 1814, was in possession of said entire tract called the Common (excluding the Church Common as now known), by parol gift of one Robert Field, and that this possession was exclusive and adverse to any claim of private ownership for at least seventy years thereafter." For the purpose of making out title by adverse possession, evidence of a gift by parol is competent to show the character of the possession. See for example *Wheeler* v. *Laird*, 147 Mass. 421.

The next question or questions submitted to the court by the master concern the admission of the testimony of one Bestor and one Harwood. Bestor was allowed to testify against the defendant's objection that he was seventy-eight years old and had lived

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in Enfield all his life; that his grandmother, one of the old settlers of the town, came there in 1802 and died in 1857; and that "he had heard his grandmother and the rest of the old people talk about it and say that Robert Field gave the common and burying ground to the town of Greenwich." Harwood was allowed to testify that his father, who died in 1908 at the age of seventy-eight, told him "that his [the witness's] grandfather said that Robert Field gave this piece of land to the South Parish of Greenwich for a common."

We assume on the report that there was no evidence that the declarations made by Harwood's grandfather and those made by Bestor's grandmother and "the rest of the old people" (referred to in his testimony) were made "upon the personal knowledge of the declarants." For that reason the testimony cannot be taken to have been admitted under R. L. c. 175, § 66.

These declarations, being declarations upon a matter of general if not of public interest, are within one of the exceptions to the rule excluding hearsay evidence so far as the subject matter of them is concerned; as to this see *Hall* v. *Mayo*, 97 Mass. 416, 418; *Boston Water Power Co.* v. *Hanlon*, 132 Mass. 483, 484.

It is generally laid down that evidence to be admissible under this exception to the rule against hearsay must be evidence of a general or common reputation as to the existence or non-existence of the matter of public or general interest. See for example Starkie on Evidence, (10th Am. ed.) 47–49; 1 Phillips on Evidence, (6th ed.) 236; 1 Greenleaf on Evidence, (5th ed.) § 128; Wigmore on Evidence, §§ 1584, 1585. The statement of the rule heretofore made in our decisions might raise the question whether reputation evidence in this connection means anything more than evidence which is reputed to be the fact as distinguished from evidence which is known by the declarant to be the fact and so to include the individual assertion of a deceased person not made on personal knowledge. See Gray, J., in *Hall* v. *Mayo*, *ubi supra*, and Devens, J., in *Boston Water Power Co.* v. *Hanlon*, *ubi supra*.

We do not find it necessary to pass upon that question here. For if this exception is limited to cases where there was a general or common reputation, we are of opinion that it would be going too far to limit the exception to cases where the declarant stated that there was a general reputation. Since it is not possible to

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determine by a preliminary examination whether there was or was not a general reputation, we are of opinion that testimony by a witness that he had heard the fact "from old persons" now deceased is competent evidence of a general or common reputation. Bestor's testimony therefore was competent so far as this matter is concerned. And see Wigmore on Evidence, § 1584. If it is competent to prove a general or common reputation by the declaration of one person that he had heard the fact from old persons now deceased, it is equally competent to prove a general or common reputation by putting in evidence the declarations of many persons where each declarant heard of the fact from one person only. Where all the residents of the place in question are severally shown to have made the statement, a general or common reputation is made out in proof. In like manner a general or common reputation is made out where many although not all are shown to have made individual assertions of the fact. We are therefore of opinion that Harwood's testimony, in connection with Bestor's, was admissible so far as this consideration is concerned.

It has been said that evidence, to be admissible under this exception to the rule against hearsay, must be evidence of the general right and not of particular facts. Starkie on Evidence, (10th Am. ed.) 49. 1 Phillips on Evidence, (6th ed.) 638. *The Queen* v. *Bliss*, 7 A. & E. 550. But as is pointed out in Wigmore on Evidence, § 1585, the more correct statement of this limitation of the exception here in question is that the declarations to be admissible must be declarations of the public or general right and not of the particular exercise of it. It is no objection to Bestor's and Harwood's testimony that the declarations testified to by them dealt with the particular fact that the common right began in a parol gift made by Robert Field, for whom the plaintiff town was named.

The master, subject to the defendant's objection and exception, "admitted evidence offered by the plaintiff from the valuation lists of the town from 1875 down through all the years, showing that the Town Common was noted on the books of the assessors as town property and exempt under the law." The correctness of his ruling admitting this evidence was submitted by the master to the court.

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We are of opinion that it was admissible. The defendant's case was that she and her husband had acquired title to the land in question by adverse possession. This adverse possession, according to her contention, began in 1884, when the adjoining land was conveyed to her husband, and lasted until the soldiers' monument was erected by the plaintiff town in December, 1907, a period of twenty-three years. The plaintiff's case was that it entered into possession of the locus under a parol gift made in 1814 and had held exclusive adverse possession of it ever since. It is stated in the plaintiff's brief that the defendant's husband died in 1907. If he had been alive at the time of the hearing before the master, he could have been put on the stand by the plaintiff and forced to testify to the fact (if it was a fact) that throughout the twenty-odd years during which under the defendant's contention he was in exclusive adverse possession of the locus as owner of the fee he never paid a tax upon it. He could have been forced to testify to this fact (if it was a fact) because the fact that he never paid a tax upon the locus during the time in question is some evidence that he was not in possession of it as owner during that time. This fact (that he never paid a tax on the locus throughout the twenty-odd years in question) is some evidence that he was not in possession as owner of it, because both in legal contemplation and in practice a person in possession of land as owner of it pays taxes on it. The plaintiff was not restricted to proving this evidentiary fact by direct testimony. It was open to it to prove it by circumstantial evidence as well as by direct testimony. In the case at bar the way in which the plaintiff was allowed to prove the evidentiary fact (that for the twenty-odd years during which the defendant contended that her predecessor in title was in exclusive adverse possession of the locus he never paid a tax on it) was by letting it produce the tax "valuation lists" for those years. It appeared from these "valuation lists" that no tax had been assessed upon the locus to any one during these twenty-odd years, and consequently that no tax could have been paid by the defendant's predecessor in title. The "valuation lists" are admissible, because if a parcel of land is not entered on them it is not taxed; and if not taxed, no tax on it could have been paid by the defendant's predecessor in title.

The admissibility of the valuation lists for nine years (from 1875

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to 1884) before the beginning of the alleged possession by the defendant's predecessor in title stands on similar ground. The fact that no individual person paid a tax during the time or a portion of the time during which the plaintiff town claimed to have had adverse possession of the locus had some tendency to show that the possession of the town during that time was exclusive. For the converse proposition that the assessment to and payment of taxes by a person is some evidence that his possession is adverse, see *Whitman* v. *Shaw*, 166 Mass. 451, 461. Of course the locus being held by the town for a public common, and so for a public use, was not taxable; consequently the fact that it did not pay a tax was not material.

Relying upon *Proprietors of Jeffries Neck Pasture* v. *Ipswich*, 153 Mass. 42, the defendant has argued that "a town cannot without a corporate vote, acquire rights in land by virtue of continued acts of the selectmen and the surveyors of highways and of private inhabitants of the town." The finding of the master is "that the town of Enfield, its selectmen and citizens generally have laid claim to said land as the property of the town of Enfield ever since a time prior to the year 1814." This is a finding that there was a corporate action, if that is necessary. No objection was taken to the admission of the acts of the "selectmen and citizens generally."

The learned counsel for the defendant has not addressed his argument to the matters submitted to the court by the master's report and to the exceptions taken to the report, which were the only matters in addition to the plea to the jurisdiction open to him in the Superior Court and in this court. And he has argued several matters as to the correctness of the master's findings on the evidence which were not before the Superior Court and are not before us. We have considered all questions open under the report and the defendant's exceptions to it and argued here. The entry must be

Decree affirmed.

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STEPHEN A. CHASE & others *vs.* ADAM H. DICKEY & others, trustees.

Suffolk. March 27, 28, 1912. — October 9, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Parties, Petition to intervene, Estoppel. *Charity. Religious Society. Attorney General. Devise and Legacy. Words,* "Balance."

In a suit in equity by the officers of an unincorporated church, as constituting a corporation by virtue of R. L. c. 37, § 1, to compel a transfer to the plaintiffs of real estate devised to the church upon an alleged charitable trust by the residuary clause of a will, where the Attorney General had become a party and had set up as a bar R. L. c. 37, § 9, alleging that the plaintiffs were incapable of holding the property because the income from it exceeded $2,000 a year, the only heirs at law of the testatrix filed a petition to intervene, alleging that the residuary clause of the will was void by reason of the statute and the action of the Attorney General thereunder, and also that the alleged trust was invalid because contrary to public policy and because of indefiniteness and that the real estate devised vested in the heirs at law as intestate property. It appeared that the heirs at law had made settlements with the testatrix during her life, under which they had received large sums of money which they retained, had released all claims as heirs against her estate and had covenanted not to contest any disposition of her property that she might make. *Held,* that the heirs at law should be allowed to intervene to the extent of being heard upon the validity of the trust, and that they were not precluded from being heard by their covenants or by their retention of the sums received by them.

Under the provision of R. L. c. 37, § 9, that "the income of the gifts, grants, bequests and devises made to or for the use of any one church shall not exceed two thousand dollars a year, exclusive of the income of any parsonage land . . .," the validity of a gift to a church of property yielding an income in excess of the limitation can be brought in question only by the Commonwealth; but this may be done by the Attorney General on becoming a party to a suit which was not instituted by him.

A corporation under R. L. c. 37, § 1, consisting of the officers of an unincorporated church performing duties similar to those of deacons or wardens, is prohibited by § 9 of the same chapter, when objection is made by the Commonwealth, from receiving a gift of property to be held by it in trust and not for its own special uses which produces an income of more than $2,000 a year.

The provision of R. L. c. 37, § 9, by which a church is prohibited, when objection is made by the Commonwealth, from receiving a gift of property which produces an income of more than $2,000 a year, although it prevents a church from taking such property devised to it as trustee, does not affect the validity of such a devise, which must be determined independently of the statute.

Where a gift by will of the residue of a large estate provides that such portion of the income as shall be necessary shall be used for the repair of certain buildings,

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and "that the balance of said income and such portion of the principal as may be deemed wise shall be devoted and used" for a general purpose alleged to be charitable, the provision for the repair of the buildings can be regarded as a charge on the fund subordinate to the main purpose of the trust, so that, if this provision should fail or be unenforceable, it would not affect the character of the true residuary provision of the will as to the "balance" of the income.

A gift by will of property of which the income shall be used for keeping in repair a church building used as a place of public worship is a gift for a charitable use.

A residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me" is not void by reason of indefiniteness, assuming that such teachings are not more difficult of ascertainment than those of other Christian sects.

The founder of "Christian Science" left by her will the residue of her property to "the Mother Church — the First Church of Christ, Scientist, in Boston, Massachusetts, in trust for the following general purposes: . . . I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me." In a suit in equity by the officers performing the duties of deacons or wardens of the church named as trustee, as constituting a corporation under R. L. c. 37, § 1, praying for the delivery of the trust property to them, in which the Attorney General was a party and set up as a bar R. L. c. 37, § 9, and in which it was decided that the plaintiffs were incapable of holding the property because the income from it exceeded $2,000 a year, the heirs at law of the testatrix were allowed to file an intervening petition in which they alleged that the residuary clause was void by reason of the action of the Attorney General under the statute and also that the alleged trust was contrary to public policy, but on this last ground they made no argument. *Held*, that, assuming that "the religion of Christian Science as taught" by its founder stood as a subject for charity upon the same footing as the religion of other Christian sects, the gift was one to a public charity; that the purpose of the gift and the trustee named were not so inextricably combined that they must stand or fall together; and that, the trustee named being incapable of taking, the trust would not be permitted to fail for that reason; but that an inquiry into the character of the teachings of the founder of Christian Science further than was possible upon the record would be necessary before it could be determined whether the assumption as to the religion so taught was justified. An order was made that the bill should be dismissed unless proper amendments to it were made within a time limited.

RUGG, C. J. This is a suit in equity, in which the plaintiffs aver that they are "the 'Christian Science Board of Directors' in charge of all the spiritual and temporal affairs and of the property of The First Church of Christ, Scientist, in Boston, Mass., also known as the 'Mother Church,' an unincorporated religious society in said Boston maintaining regular religious services in its church edifice, and that their duties are similar to those of deacons

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or wardens of churches or religious societies, and that they, as such, with their successors, constitute a corporation under section 1 of chapter 37 of the Revised Laws." The original defendants were the executor of the will of Mary Baker G. Eddy, and Dickey, McLellan and Fernald, trustees under deeds from the testatrix.

Mrs. Eddy, the founder of "Christian Science," so called, conveyed certain real estate, the net annual value of which is largely in excess of $2,000, to the defendants, Dickey, McLellan and Fernald, to hold in trust for certain uses during her "earthly life and at the termination thereof to dispose of the same in accordance with the provisions of" her "last will and the codicils thereto." She has deceased, and her last will and codicils have been allowed in New Hampshire, the State of her domicil, and admitted to ancillary probate in this Commonwealth. The language of the residuary clause of her will now material is: "I give, bequeath and devise all the rest, residue and remainder of my estate, of every kind and description, to the Mother Church — the First Church of Christ, Scientist, in Boston, Massachusetts, in trust for the following general purposes: I desire that such portion of the income of my residuary estate as may be necessary shall be used for the purpose of keeping in repair the church building and my former house at Number 385 Commonwealth Avenue in said Boston, which has been transferred to said Mother Church, and any building or buildings which may be, by necessity or convenience, substituted therefor; . . . and I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me."

The bill alleges a request upon the trustees for a conveyance to the plaintiffs of the real estate, a willingness on their part to make it, but a refusal without an order of court on the ground that the plaintiffs are incapable of holding it by reason of R. L. c. 37, § 9. The language of this section is: "The income of the gifts, grants, bequests and devises made to or for the use of any one church shall not exceed two thousand dollars a year, exclusive of the income of any parsonage land granted to or for the use of the ministry." The prayer of the bill is for a conveyance of this real estate

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to the plaintiffs as entitled thereto under the will of Mrs. Eddy. The defendant trustees admit the allegations of the bill and pray for the instructions of the court. The executor avers that the personal estate of the testatrix is amply sufficient to pay all debts and legacies, and that there will be no occasion to sell the real estate here in question for that purpose, and otherwise adopts the answer of the trustees.

The Attorney General became a party, and demurred on the ground that the next of kin of Mrs. Eddy were necessary parties. This demurrer was overruled.

The Attorney General then answered admitting the substantial allegations of fact in the bill, but setting up R. L. c. 37, § 9, as a bar to its maintenance.

George W. Glover and Ebenezer J. Foster [Eddy], being all the next of kin and heirs at law of the testatrix, have petitioned for leave to intervene, reciting the appearance of the Attorney General and his contention under the statute, and further setting up (1) that the residuary clause in the will is of no effect by reason of the statute, (2) that it is in contravention of the public policy of the Commonwealth, and (3) that it is "vague, indefinite and incapable of enforcement as a valid testamentary disposition," wherefore, they say, the legacy has failed, and the property is intestate and vested in them as the sole heirs at law of Mrs. Eddy.

The plaintiffs and all the defendants, except the Attorney General, objected to the allowance of the petition to intervene, on the ground that the heirs at law made what are termed "family settlements" with Mrs. Eddy during her life, according to which they each received from her and still retain large sums of money and other valuable rights, and in consideration thereof released and extinguished all claims as heirs against her estate, and covenanted not to contest any disposition of her property that she might make.

The case was heard upon the pleadings before a single justice, who reserved "all questions raised by the record . . . for the consideration and determination" of this court.

1. It is not necessary to consider the demurrer of the Attorney General. All the heirs at law have petitioned to be made intervening parties, which presents the questions of substance raised by the demurrer.

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2. The heirs at law should be allowed to intervene to the extent of being heard upon the validity of the trust. If for any reason the residuary clause of the will is ineffective, the estate must go somewhere. It is either intestate property or, possibly, liable to escheat to the Commonwealth. It is not necessary to decide its devolution. In any event the subject is one in which the heirs at law are interested, and hence are entitled to a hearing. It may be assumed that if the Commonwealth had not become a party, the heirs at law alone would not be parties in interest as to the effect of the inhibition of the statute against the gift to a church. It would not be for them to raise that question, for the reason that the Commonwealth alone has a right to challenge such a gift. *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280. But here the Attorney General has been made a party. He has raised expressly the point that the plaintiffs are not entitled to a conveyance because of the invalidity of the residuary clause. Hence the hostile attitude of the State is disclosed. This gives the heirs at law a standing, because if the contention of the Attorney General is sustained, it is possible that the heirs may take. Their kinship is not extinguished by their so called family settlement agreement. They are not of necessity precluded by their covenants and the advancements to them from presenting arguments as heirs at law touching intestate property or from showing that in truth the property is intestate. It may be assumed that a covenant not to contest a will or to release all claim to share in the estate of an ancestor based upon an adequate advancement freely made with sufficient knowledge of the facts and without fraud would be enforced. *Quarles* v. *Quarles*, 4 Mass. 680. But this principle fails when all the heirs have joined in a similar covenant and there is intestate estate. While it might be insisted upon for the benefit of heirs who had not covenanted in like manner, when all heirs are in this regard on the same footing, there is no one in whose behalf the covenant may be invoked. This is not an initial contest touching the execution of the will, testamentary capacity or other grounds for opposing the allowance of the will, as to which different rules of law would arise. It is a question whether the instrument, allowed as the will, disposes of the estate in a valid way, or whether it is inoperative in law.

The heirs at law commonly are necessary parties to any proceed-

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ing where the inquiry is whether a good charitable trust is created. *Cassidy* v. *Shimmin*, 122 Mass. 406, 411. *Jackson* v. *Phillips*, 14 Allen, 539, 571. *Packard* v. *Marshall*, 138 Mass. 301, 303. *Kent* v. *Dunham*, 142 Mass. 216. *Whitwell* v. *Bartlett*, 211 Mass. 238. This principle applies under the circumstances of this case. The heirs at law are necessary parties in the determination of the question whether the trust is so contrary to public policy that it cannot be carried out, or so indefinite and vague as to be incapable of administration as a public charity.

3. The validity of the residuary clause, so far as dependent upon the church statute (R. L. c. 37, § 9) is open upon this record. A gift like the present to a corporation beyond its power to take can be questioned in the first instance by the Commonwealth alone. It is good against everybody else. The restrictions upon the powers of a corporation to hold property imposed either by the terms of its charter or by general law can be taken advantage of only in a direct proceeding by the creating sovereign power. *Jones* v. *Habersham*, 107 U. S. 174, 188. *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 273. *Evangelical Baptist Benevolent & Missionary Society* v. *Boston*, 204 Mass. 28, 33. This proceeding is in that sense direct and immediate. The Attorney General has become a party. He is a proper party. No objection has been or could be made justly against his appearance. He raises peremptorily the question of corporate capacity to take. The particular form of the proceeding is not material. The substantial inquiry is whether it is of such a nature that the material questions are open as they would be in an action instituted by himself for that purpose. This proceeding is sufficient for that end. It is distinguishable from *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, in fundamental respects. There not only was the Attorney General not a party, but the State acting through its legislative department had waived its rights and legalized the gift by the enactment of a statute.

4. The plaintiffs set out as the ground of their right to a conveyance that they are a corporation under R. L. c. 37, § 1. The material allegations are that their duties are similar to those of deacons or wardens of churches or religious societies, and that these and similar officers under the statute are "deemed" a body "corporate for the purpose of taking and holding in succession all gifts, grants, bequests and devises of real or personal estate

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made either to them or their successors, or to their respective churches, if unincorporated, or to the poor of their churches." The substance of this section is found first in Prov. St. 1754–55, c. 12, where it was prefaced by a preamble indicating that its enactment was induced by doubts whether grants and donations to such officers or to churches would go in succession. *Goring* v. *Emery*, 16 Pick. 107, 118. *Weld* v. *May*, 9 Cush. 181, 185. *Earle* v. *Wood*, 8 Cush. 430, 437. *Stebbins* v. *Jennings*, 10 Pick. 172, 189. Section 1 of the original act was and has remained in successive re-enactments and revisions in substance the same as the present law. The prohibition in § 3 of the original act was against an annual income from gifts in excess of £300. There was a further provision that donations, bequests and devises, not made in accordance with the statute, should be void; but this was repealed by St. 1785, c. 51. This is the nearest approach to a real mortmain act in Massachusetts. As is pointed out in *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 284, the limitations upon the power of corporations in this Commonwealth to hold property, while probably growing out of the mortmain legislation of early times in England, has been narrow in scope, and has been based upon considerations of public policy and in the interest of the State alone. The slight changes in phraseology of the statute in its successive enactments do not indicate any intent by the Legislature to change the law in the parts now under consideration. The natural construction of the language of R. L. c. 37, §§ 1 and 9, is that unincorporated churches and religious societies may receive donations up to the limited amount, and as against the Commonwealth they have no right to receive and hold gifts in excess of this amount. It is plain that a gift directly to a church for its own benefit is within the prohibition. The residuary clause of this will makes a gift to the First Church of Christ Scientist "in trust" to be devoted to the repair of church buildings and "the purpose of more effectually promoting and extending the religion of Christian Science as taught by" the testatrix. This latter purpose in substance is not a gift to the particular ecclesiastical organization for its special needs. It manifests a broader design, and authorizes the use of the gift for spreading the tenets of faith taught by the testatrix over an area more extensive than could possibly be gathered in one congregation. It in-

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cludes the most catholic missionary effort both as to territory, peoples and times. It is the founding of a trust of comprehensive scope for the upbuilding of the sect which the testatrix made the object of her bounty. While in a general sense it may be said that every church is devoted to "promoting and extending the religion" of the denomination to which it belongs, a gift to the particular use described in this will is not a gift to the church to do with as it chooses. The testamentary statement of the purpose of the gift when coupled with its magnitude and express fiduciary words manifests an intent that it shall be devoted as a trust fund to the specified ends. The gift is stated to be "in trust." That this is its real meaning is confirmed by reference to the clause of the will and to the second codicil by which substantial legacies are given directly or without restriction to the same First Church. The will shows a plain appreciation by its maker of the vital distinction between an absolute gift and a trust. The question, then, is, Does the statute prohibit a gift to a church of property of more than $2,000 annual income to be held by it in trust, and not for its own special uses? It may be conceded that a gift upon these trusts would not be so alien to the objects of a church as to be beyond its power to take and hold apart from the statute. Parishes, which are religious societies, have been held competent to receive gifts in trust for the maintenance of schools. *First Parish in Sutton* v. *Cole*, 3 Pick. 232. *White* v. *South Parish in Braintree*, 13 Met. 506. *Boxford Religious Society* v. *Harriman*, 125 Mass. 321. It is within the undoubted power of a church or kindred organization to devote its unappropriated resources to the aid of other domestic or foreign churches, missions or other religious purposes.

It was said by Mr. Justice Gray in *Jones* v. *Habersham*, 107 U. S. 174, at 182: "It is a novel proposition, as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination so as to promote the cause of religion in the State in which it is established." *Sohier* v. *Wardens & Vestry of St. Paul's Church*, 12 Met. 250, 258. *Baker* v. *Fales*, 16 Mass. 488, 495. *McAlister* v. *Burgess*, 161 Mass. 269. But this consideration is of small weight. Apart from statute, no bound is fixed to the amount of property which a chari-

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table or other corporation may hold. The statute prohibits donations above the stipulated amount "to or for the use of any one church." These words in their usual sense apply as much to gifts in trust as to gifts outright. There is nothing in the history of the statute or its context to indicate that they are employed in any restricted sense. In ordinary speech, a gift to a church is one to it by name. Of that description is the present devise. The history and the arrangement of R. L. c. 37 indicate that §§ 1 and 9 are complementary of each other. So far as deacons, wardens and other similar church officers are clothed with corporate power to receive donations under § 1, to that same extent they act under the limitation and inhibition set forth in § 9. This view is confirmed by other statutes of a kindred nature. R. L. c. 37, § 10, creates monthly meetings of Friends bodies corporate for the purpose of holding donations "to the use of such meeting or to the use of any preparative meeting belonging thereto," but the annual income of property so held "shall not exceed five thousand dollars a year." R. L. c. 36, §§ 40 and 41, limit the power of trustees of the Methodist Episcopal churches to hold property in trust for religious uses (outside of church buildings) to such as yields a yearly income not in excess of $4,000. R. L. c. 36, § 44, limits the property of Roman Catholic church corporations to $100,000, exclusive of church buildings. Church corporations thus are restricted by general law as to the amount of property which may be held. Laws of general scope respecting charitable corporations limit the amount of property which they may hold. R. L. c. 125, §§ 7 and 8; c. 124, § 19. The policy of the Commonwealth appears to have been declared in its early days and steadfastly adhered to through the intervening years to maintain direct control over the amount of property which should be vested in its church and charitable corporations. Its manifest purpose has been to establish a limit for the accumulation of property in the hands of any one such corporation. Many special acts of incorporation scattered through the acts of the Legislature, year by year, almost from the beginning, fixing limitations of varying extent, show a similar policy.

The conclusion seems irresistible from these considerations that the plaintiffs as a body corporate under R. L. c. 37, § 1, when objection is made by the Commonwealth, are restrained

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from taking and holding the property described in the bill by reason of § 9. In *Kinney* v. *Kinney*, 86 Ky. 610, *Morgan* v. *Leslie*, Wright, 144, and *Heiskell* v. *Chickasaw Lodge*, 87 Tenn. 668, relied on by the plaintiffs, the State was not a party, and a statute different from ours was under consideration. Hence it is not necessary to review these cases.

5. It is contended by the Attorney General that, it being determined that the plaintiffs cannot take, the bill must be dismissed. But the reservation should not be so narrowly construed. It presents for decision "all questions raised by the record." So far as other material matters are disclosed upon the record with sufficient fulness, which must be decided ultimately and which have been argued by the parties in interest, they are ripe for decision now under the terms of the report.

6. The church statute affects only the power of the church to receive and hold as against the Commonwealth, and is not a limitation upon testamentary capacity. This follows inevitably from the grounds of decision in *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280. The differences in phraseology between R. L. c. 125, § 8, the statute there considered, and the one in question in the case at bar, are immaterial upon this point. This statute is not an amendment to the statute of wills. To the same effect is *Glover* v. *Baker*, 76 N. H. 261.

7. Nor is the devise void simply because of the church statute. The plaintiffs are prevented from taking advantage of the will because of the statute, and not because of any infirmity inherent in the devise. The statute does not strike at the gift itself and declare that void. It only determines the right of the plaintiffs as devisees. It does not undertake to affix any designation to the devise. Its validity must be considered on its own merits. A different question might arise if the gift had been absolute to the church. But where it is a trust which is created, its soundness must be considered as a question by itself.

8. It is contended that the devise is void, under the principle that if under the language of the will the property may be applied to other than strictly charitable uses, then it is too indefinite in a legal sense for the court to execute. *Nichols* v. *Allen*, 130 Mass. 211. *Wilcox* v. *Attorney General*, 207 Mass. 198. *Dunne* v. *Byrne*, [1912] A. C. 407, 411. The second codicil, which removes

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the Pleasant View estate from the corpus of the trust and revokes the provisions of the will touching it, simplifies this branch of the case. But it is suggested that the provisions for the repair of the Commonwealth Avenue house (which is averred to be the parsonage of said church) and of the church building are private and not charitable uses, and hence that the whole devise fails under the rule just stated. Even if it be assumed that this premise is sound, the result does not follow.

The provision of the will is equivalent to making the repair of the Commonwealth Avenue house and of the church a charge on the main fund. The clause as a whole indicates care for the house and church as one purpose, but the final residuary purpose is the promotion and extension of the religion of Christian Science. The word "balance" in this connection is employed in the twofold sense, of indicating first the subsidiary nature of the repair of the church and house as compared with the other object, and, second, the essentially residuary character of the ultimate testamentary design. Hence, if the first two objects fail or are unenforceable, the last becomes the true residuary provision of the will, sweeping in all those that are void or lapse for any other reason. In this aspect, the case at bar comes within the rule applied in *Dexter* v. *Harvard College*, 176 Mass. 192, and cases cited at 196. *In re Rogerson*, [1901] 1 Ch. 715.

This construction is confirmed by the further provision that for the chief residuary purpose of "promoting and extending the religion of Christian Science" any portion of the principal of the fund may be used, a power not attaching to the other objects. The clause read as an entirety manifests a purpose to make this the dominating and real residuary purpose of the testatrix. This conclusion does not impinge in any degree upon the thoroughly well established principle that where a fund is left for the support in perpetuity of several trusts, one private and others charitable, the whole fails, *Rotch* v. *Emerson*, 105 Mass. 431, 433, *Chamberlain* v. *Stearns*, 111 Mass. 267, and its corollary that where property is to be distributed by executors among objects, some of which are private and others charitable, the gift fails as a charity, *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 195, *Minot* v. *Attorney General*, 189 Mass. 176, and *Gill* v. *Attorney General*, 197 Mass. 232, 236.

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We are of opinion, however, that a gift for the repair of a church, in the modern sense of that word, as a place for public worship, open to everybody and established for the promotion of religion and morality among all people, whether regularly connected with its ecclesiastical organization or not, is a charity. "A gift to a church *eo nomine* is a gift to a charity." *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 197. *Dexter* v. *Gardner*, 7 Allen, 243, 247. *Osgood* v. *Rogers*, 186 Mass. 238. *McAlister* v. *Burgess*, 161 Mass. 269. *Sears* v. *Attorney General*, 193 Mass. 551, and cases cited. In the latter case the restriction of *Old South Society* v. *Crocker*, 119 Mass. 1, and like cases to their special facts is referred to. *Bartlett, petitioner*, 163 Mass. 509, 514. *Teele* v. *Bishop of Derry*, 168 Mass. 341. Indeed, "repair of churches" is not only one of the charities mentioned in St. of 43 Eliz. c. 4, but has been made the basis of a considerable class of charitable uses. *Jackson* v. *Phillips*, 14 Allen, 539, 552.

In England it is settled that the building and repair of a church and the repair of a parsonage are charitable objects. *Attorney General* v. *Bishop of Chester*, 1 Bro. C. C. 444. *Sinnett* v. *Herbert*, L. R. 7 Ch. 232. *Vaughan* v. *Thomas*, 33 Ch. D. 187.

But the plaintiffs are precluded from taking, even if a devise for the repair of a church building devoted to public worship and of a parsonage is a devise to a charity, because it appears that other legacies in this will to the First Church of Christ, Scientist, equal the amount it is permitted to hold under the statute, and it is averred that the estate is of such size that the legacies will all be paid in full. Moreover, we understand the plaintiffs to concede in their bill of complaint that the fund is not needed for the repair of the church building and the Commonwealth Avenue house and is to be devoted "exclusively for more effectually promoting and extending the religion of Christian Science." Hence that is the only aspect of the case which requires further consideration. The devise is not void because of reference to these two objects.

9. The residuary trust as thus interpreted is not void for general indefiniteness. The promotion of "the religion of Christian Science" is as definite as many donations which have been upheld as public charities. Relief of spiritual destitution and religious or moral ignorance, intolerance or perversity, is a good public charity. The spread of the Christian religion and of its various denomina-

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tions and sects has been held many times to be a charitable use for trusts. *Baker* v. *Fales*, 16 Mass. 488, 495. *Going* v. *Emery*, 16 Pick. 107. *Hinckley* v. *Thatcher*, 139 Mass. 477, 488. *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, 572.

Christian Science as a denomination of Christianity may be assumed to be no more difficult of ascertainment than many other sects. It is argued, however, that because the testatrix confined her benefaction to the spread of Christian Science as taught by her, there is thereby involved an inquiry into oral utterances of such vagueness and dependent upon such uncertainty of recitals by hearers that indefiniteness in a legal sense must be inevitable. Certainly this cannot be presumed in advance of a determination of what her teachings in fact were. It is not to be assumed that they are more difficult of ascertainment than those of most other sects of Christendom, nor that a court of equity would encounter any insurmountable difficulty in administering the trust.

10. The facts disclosed on the record and appearing in the will do not lead to the conclusion that the intent of the testatrix was fixed on the donee named so profoundly that if the donee fails, the gift fails. The purpose of the gift and the trustee are not so inextricably combined that they must stand or fall together. The support of a branch of the Christian religion being the declared purpose of the trust and this being a public charity, the gift will stand unless it appears that the discretion of the particular trustee named is of its essence. There is disclosed no exceptional reliance upon the particular corporation named beyond that which appears commonly. The establishment of the trust does not seem to depend upon the particular instrument for execution nominated in the will. It is the not unusual case of a plain charitable intent, where the legatee is incapable of taking, and the trust is not permitted to fail for lack of a trustee. *Bliss* v. *American Bible Society*, 2 Allen, 334, 337. *Winslow* v. *Cummings*, 3 Cush. 358. *Richardson* v. *Mullery*, 200 Mass. 247. It does not fall within the class of cases where the administration of the trust is of its essence, and where it cannot be administered in any other way than that pointed out in the will. The situation here presented distinguishes the case plainly from *Stratton* v. *Physio-Medical College*, 149 Mass. 505, *Bowden* v. *Brown*, 200 Mass. 269, and like cases.

11. In this opinion heretofore it has been assumed without

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deciding that the words of the will, "the religion of Christian Science as taught" by Mrs. Eddy describe a denomination of Christianity, which stands upon the same footing in respect of being a proper subject for charity as other Christian sects. One of the objections to the validity of the trust stated by the petitioners to intervene is that these teachings of the testatrix were "in contravention of the public policy of the Commonwealth." This aspect of the case has not been argued by the petitioners to intervene nor by the Attorney General. In view of the peculiar language of the will in limiting the gift to the promotion and extension of Christian Science as taught by Mrs. Eddy, an inquiry into the character of her teachings is necessary. Two books written by her have been called to our attention. Neither of these purport in terms to be the exclusive authoritative statements of her teachings. Quotations from other of her writings are found in the petitioners' brief. There appears not to be enough in the present record to furnish a basis for the determination of the point whether the "religion of Christian Science as taught by" Mrs. Eddy is contrary to the public policy of the Commonwealth. That question is therefore left open.

12. Upon the frame of the bill as it now stands it must be dismissed. All parties who can have any interest in the trust are before the court, except a competent trustee. By proper amendments to the bill, it would seem that all the remaining issues can be raised. Leave may be granted for such amendments to be filed within thirty days from the filing of this rescript. Otherwise the bill may be dismissed.

So ordered.

F. S. Streeter, of New Hampshire, *& S. J. Elder*, (*F. C. Demond*, of New Hampshire, *E. A. Whitman*, *W. A. Morse & L. M. Abbott* with them,) for the plaintiffs.

C. F. Choate, (*T. W. Streeter* with him,) for the defendants Dickey and others, trustees.

F. T. Field, for the Attorney General.

H. Taylor, of District of Columbia, *& H. Parker*, (*W. E. Chandler*, of New Hampshire, *J. D. Long & H. H. Fuller* with them,) for the petitioners to intervene.

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JAMES A. HOUSTON *vs.* PATRICK B. MAGRANE & others.

Suffolk. April 15, 1912. — October 14, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DECOURCY, JJ.

Sale, Of good will. *Name. Equity Jurisdiction*, To enjoin use of name. *Corporation*, Change of name.

One named James A. Houston, having a valuable established business, of which a considerable asset was its good will consisting principally of the right to use the name "Houston" and the name "James A. Houston" in connection with such business, sold the business to certain purchasers under an agreement in writing, in pursuance of which he formed a corporation called the "James A. Houston Company," transferred all its capital stock to the purchasers, and conveyed to such corporation the business conducted by him "and all assets of every name and nature including the entire stock in trade . . . and the good will of the business, together with all trade marks, trade names . . . also the sole permanent right to use the name of James A. Houston in continuing the business now carried on by him, but reserving to himself the right to use the name of Houston (but not James A. Houston) as a part of any firm or corporate name." The purchasers as the stockholders of the corporation proposed to change the name of the corporation to "Magrane Houston Company," and the seller brought a bill in equity to enjoin such use of the name "Houston." *Held*, that the right reserved to the plaintiff to use the name "Houston" was not an exclusive right but was merely one to be used in common with the corporation, which owned the general right to use the plaintiff's name in continuing the business, including the right to use a part of the name in combination with other names, and that the plaintiff was entitled to no relief.

Whether under St. 1903, c. 437, §§ 5, 40, 41, the right of a corporation to change its name is subject to the control of the courts before any action upon the proposed change by the commissioner of corporations, here was referred to as a question which it was not necessary to consider.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 28, 1912, to restrain the individual defendants and the defendant James A. Houston Company, a corporation, from using the name "Houston" as a part of any firm or corporate name and particularly as a part of the name "Magrane Houston Company," the rights of the parties depending upon an agreement in writing between the plaintiff and the individual defendants dated February 24, 1906, a copy of which was annexed to the bill.

The agreement is described in the opinion where its most mate-

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rial provisions are quoted. An important averment of the bill also is quoted in the opinion.

The defendants demurred to the bill, and the case was heard by *Hammond*, J., who made a decree sustaining the demurrer. The plaintiff appealed, and, at the request of the plaintiff and with the consent of the defendants, the justice reported the case for determination by the full court.

The case was submitted on briefs to all the justices.

S. J. Elder, I. R. Clark & G. F. Ordway, for the plaintiff.

J. H. Casey & N. N. Jones, for the defendants.

SHELDON, J. The rights of these parties depend primarily upon the terms of the agreement between the plaintiff and the individual defendants. By that agreement the plaintiff was to form a corporation to be named "James A. Houston Company," and was to convey to that corporation the business then conducted by him in Boston, "and all assets of every name and nature including the entire stock in trade . . . all books used . . . in the business, mailing lists and the good-will of the business, together with all trade marks, trade names and bills and accounts receivable and cash on hand also the sole permanent right to use the name of James A. Houston in continuing the business now carried on by him, but reserving to himself the right to use the name of Houston (but not James A. Houston) as a part of any firm or corporate name." This agreement was carried out; the corporation was formed; and in accordance with the agreement the individual defendants bought of the plaintiff all the capital stock thereof, and now control the same. They propose to change the name of the corporation to "Magrane Houston Company;" and the plaintiff denies their right to do this, and claims that neither the corporation nor they as its stockholders have the right to use in the name of the corporation or in the prosecution of its business the surname "Houston," but only to use the full name "James A. Houston."

The agreement evidently was written by a skilled draughtsman. It was drawn with great care and precision. It provides in the broadest terms for the transfer of everything that had been connected with the plaintiff's business. It expressly gives the right to use the plaintiff's name in continuing the business, and provides that this shall be a sole and permanent right; but it reserves to

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the plaintiff the right to use, not his whole name, but only the last part of his name, and even this reservation is not for any business purpose without limitation but merely to be used as a part of any firm or corporate name. In a document so carefully and accurately drawn, it is material to observe, first, that the right given is a sole and permanent right, while that reserved is not so expressed; secondly, that the right given is not merely to use the words "James A. Houston," but to use the name of the plaintiff, James A. Houston, in continuing the old business, while the right reserved to the plaintiff is merely to use his last name in business in a strictly limited manner; that it does not appear that any other trade names than the names "Houston" and "James A. Houston" had been used in the plaintiff's business; and that the stipulation giving to the plaintiff a restricted right to use his last name is accompanied by the additional words "but not James A. Houston," while the right of the corporation to use the plaintiff's whole name is not correspondingly limited. When the parties intended that the use of one appellation should be exclusive of the other, they were careful to state that intention so as to leave no room for interpretation.

In the opinion of the majority of the court, this agreement did not give to the plaintiff an exclusive right, but merely one to be used in common with the general owner of the right to use the plaintiff's name in this business. If this were otherwise doubtful, it would be settled by the considerations already adverted to, especially since the general right given was in terms made sole and permanent, while those words appear to have been of set purpose omitted in the reservation made in favor of the plaintiff.

The provisions of R. L. c. 72, § 5, are not applicable here. The defendants have the written consent of the plaintiff to the use of his name by the corporation in its business. And the right given to the corporation was the full right to "use" his name in continuing the business, not merely to call itself by his whole name. He cannot complain that his name or a part of it is now coupled with other names. That is one of the lawful ways of using a name.

We are not impressed by the suggestion that the whole name of the plaintiff is a less accurate designation of himself as an individual than his patronymic alone would be, or that the former would be less readily recognized than the latter as indicating the

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plaintiff. Even apart from the special circumstances of this case it would be difficult to say that a grant of the right to use one's whole name in carrying on a business did not include the right to use a part of that name.

Nor can the plaintiff have any relief on the ground that strangers or the general public may be led to fancy that he is or was engaged in a business with which he now has no connection; for this, so far as his patronymic was a trade name or an element of the good will of the business, is nothing more than was contemplated by the agreement. The names were part of the intangible assets for which he received the sum of $150,000 in addition to the fair market value of the tangible property. Indeed, the bill itself avers "that a very considerable asset of" the plaintiff's "business was the good will thereof, which consisted principally in the right to use the name 'Houston' and the name 'James A. Houston' in connection with said business." This is an allegation by which he is bound. But his agreement was to convey "all assets of every name and nature," "including the good will of the business, together with all trade marks, trade names," etc. It is impossible to say, upon the averments of the bill, that the right to use both the names "Houston" and "James A. Houston" was not given. The clause immediately following this grant could have had no other purpose than to make the right of the corporation to the use of the plaintiff's whole name in its business a sole one, while reserving to the plaintiff a concurrent right to use his last name as a part of any firm or corporate name, at least so far as this could be done without derogating from his grant of his good will. Certainly this clause must be construed together with the absolute grant which precedes it; it ought not, if this can be avoided, to be treated as cutting down the conveyance of all the assets including the good will and trade names. *A fortiori*, a forced construction ought not to be adopted to effect a purpose which we think contrary to the intention of the parties. The instrument must be "read in the light of the condition under which it was made" (Rugg, C. J., in *Coates* v. *Lunt*, 210 Mass. 314, 317); and one of those conditions is the conceded fact that the good will sold consisted principally of the right to use both of the names here in question.

We do not need to consider whether under St. 1903, c. 437,

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§§ 5, 40, 41, the right of the corporation to change its name is subject to the control of the courts before any action upon the proposed change by the commissioner of corporations.

The majority of the court consider that the decree of the single justice must be affirmed.

So ordered.

HOWARD WILLETS *vs.* HENRY L. LANGHAAR.

Berkshire. September 10, 1912. — October 15, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Easement. Deed. Water Rights. Equity Jurisdiction, Mandatory injunction. *Municipal Corporations. Way.*

A deed conveyed to the grantee and his heirs and assigns "the right to the use of the water from . . . two springs," describing them, "after supplying the two houses, to which logs are now laid, from the large spring, with water necessary for domestic purposes. And also after supplying water necessary for domestic purposes at my dwelling house and barnyard . . . and the said" grantee "is to have the privilege of carrying the water, as now carried, . . . to his house and tannery, with the privilege of the right to repair the same." *Held,* that by the deed there was created an easement appurtenant to the grantee's house and tannery land, and not an easement in gross.

Mere non-user does not conclusively impair or defeat an easement created by a deed which contains no provision that it should do so.

In a suit in equity to enjoin an alleged infringement by the defendant of a right, created by a deed of a predecessor in title of the defendant to a predecessor in title of the plaintiff, to use the waters of a certain spring upon the defendant's land to the exclusion of the defendant, it appeared that the plaintiff and his predecessors in title had not used the spring for twenty-three years preceding the alleged infringement. A master found on evidence warranting the findings that, previous to the acts of the defendant complained of in the bill, there had been no use of the spring by the defendant and his predecessors in title inconsistent with the rights given by the deed to the plaintiff's predecessor in title, and that there had been no abandonment of their rights by the plaintiff or his predecessors in title. *Held,* that the question of abandonment was a question of fact, and that it could not be said that the findings of the master were plainly wrong.

In a suit in equity it appeared that the defendant infringed upon a right of the plaintiff to use to the exclusion of the defendant the water of a certain spring upon the defendant's land and, after he had received notice of the commencement of the suit, for the purpose of conducting water from the spring to a distant house belonging to him, laid a pipe in part in land of the plaintiff under a highway in a town. Previous to the laying of the pipe within the

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highway the selectmen of the town after a public hearing had given the defendant permission to do so. *Held*, that a mandatory injunction should issue directing the defendant to remove the pipe laid in the plaintiff's land. *Held, also*, that it was not necessary to determine either the meaning or the constitutionality of St. 1903, c. 459, relating to permission to be given by municipalities to persons and corporations for the laying under public ways of pipes and conduits for the conveyance of water.

BILL IN EQUITY, filed in the Superior Court on October 22, 1908, and afterwards amended, praying that the defendant be enjoined from taking water from a spring on his property in New Marlborough which the plaintiff claimed a right to use to the exclusion of the defendant, and that the defendant be ordered to remove a two inch pipe which he had inserted in the spring and to replace a three quarter inch pipe which formerly had been there, to take up a one and a half inch pipe which, for the purpose of conducting the water under a highway to his house at a distance, he had laid within a part of the highway to which the plaintiff owned the fee subject to the easement of the public, and to restore the premises to their former condition.

The suit was referred to Carlton T. Phelps, Esquire, as master. The defendant sought to justify his laying of the pipe in the plaintiff's land over which the highway passed by a permission granted to him by the selectmen of New Marlborough on September 26, 1908, after a hearing of which the public had been given notice. Other facts found by the master are stated in the opinion.

Exceptions to the master's report were overruled and a final decree granting the prayers of the bill was ordered by *Crosby*, J. The defendant appealed.

The case was submitted on briefs.

H. C. Joyner & H. M. Whiting, for the defendant.

J. F. Noxon, M. Eisner & J. S. Stone, for the plaintiff.

RUGG, C. J. The defendant's predecessor in title in 1855 conveyed by deed to James H. Peak and his heirs and assigns "the right to the use of the water from the two springs situated in the meadow . . . after supplying the two houses, to which logs are now laid, from the large spring, with water necessary for domestic purposes. And also after supplying water necessary for domestic purposes at my dwelling house and barn-yard . . . and the said Peak is to have the privilege of carrying the water, as

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now carried, . . . to his house and tannery, with the privilege of the right to repair the same." The plaintiff now holds title by successive conveyances to the land of which Peak was then the owner, and on which stood his house and tannery. The reference in the deed to these buildings, whither the water which was the subject of the grant was being carried, shows that an easement appurtenant to the house and tannery land and not an easement in gross was intended to be created. An easement is not presumed to be personal unless it cannot be construed fairly as appurtenant to some estate. *Dennis* v. *Wilson*, 107 Mass. 591.

Three years after the deed to Peak the tannery was closed, and in 1861 it was removed, and no building has been erected in its place. The house was occupied for residence, and water from one or both of the springs in question was conveyed to it until 1885. Since then it has been substantially unoccupied and has fallen into decay.

Certain deeds in the plaintiff's chain of title made no special reference to water rights. But they were in regular form, and the water right, being an easement appurtenant, passed by deed of the land without express mention. *Atkins* v. *Bordman*, 2 Met. 457, 464. *Brown* v. *Thissell*, 6 Cush. 254. *Crabtree* v. *Miller*, 194 Mass. 123, 126.

Mere non-user does not conclusively impair or defeat an easement created by deed. In order to have such an effect there must be an element of adverse use by the owner of the servient estate inconsistent with the continuance of the easement, or acts by the owner of the dominant estate of such conclusive and unequivocal character as manifest a present intent to relinquish the easement or such as are incompatible with its further existence. Whether there has been an abandonment is usually a question of fact. *Arnold* v. *Stevens*, 24 Pick. 106, 111. *Dana* v. *Valentine*, 5 Met. 8, 14. *Dyer* v. *Sanford*, 9 Met. 395, 402. *Owen* v. *Field*, 102 Mass. 90, 114. *Barnes* v. *Lloyd*, 112 Mass. 224, 231. *Jamaica Pond Aqueduct* v. *Chandler*, 121 Mass. 3. *King* v. *Murphy*, 140 Mass. 254. *Blood* v. *Millard*, 172 Mass. 65, 70. *Whitney* v. *Cheshire Railroad*, 210 Mass. 263, and cases cited at 269.

The master has found that there has been no use of the springs by the owners of the servient estate inconsistent with the rights

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secured by the deed under which the plaintiff claims, and that the conduct of the owners of the dominant estate amounts to nothing more than a failure to exercise their rights for a period of twenty-three years, and does not constitute an abandonment. There seems to us to be no reason for reversing this finding. The evidence so far as reported is not inconsistent with it. No other facts are found by the master or appear upon the record which militate decisively against its correctness. It is possible that the evidence before the master might have warranted a different conclusion on the question of abandonment. But we cannot say that the inferences drawn by the master are not as reasonable as those sought to be established by the defendant. There is nothing which warrants us in disturbing it under the well settled practice as to master's reports. The decision of the master upon controverted questions of fact depending in part upon oral evidence, when affirmed by the court, will not be set aside unless plainly wrong. Reasonable presumptions are made in its favor. *Dean* v. *Emerson*, 102 Mass. 480. *Stevens* v. *Miner*, 110 Mass. 57, 60. *McDonough* v. *O'Niel*, 113 Mass. 92. *Morrell* v. *Kelley*, 157 Mass. 126. *Holt* v. *Silver*, 169 Mass. 435, 456. *Joslin* v. *Goddard*, 187 Mass. 165, 167. *Taber* v. *Breck*, 192 Mass. 355, 362. *Kyle* v. *Reynolds*, 211 Mass. 110, 112.

The defendant after receiving notice of the present suit laid a pipe in land within the highway to which the plaintiff owns the fee subject to the easement in favor of the public. He was not misled in any way by the plaintiff nor lulled into a belief that money damages would be accepted in settlement of any damage occasioned. Under such circumstances there is no reason why he should not remove the obstruction wrongfully placed by him on the plaintiff's land. *Curtis Manuf. Co.* v. *Spencer Wire Co.* 203 Mass. 448, 452. *Kershishian* v. *Johnson*, 210 Mass. 135, and cases there cited. Good faith or honest mistake in a case of this sort means something more than a thorough belief in the soundness of one's own legal position and in the weakness of the adverse claim of one's opponent, when the controversy has arisen before the act of trespass complained of.

It becomes unnecessary to discuss the constitutionality or meaning of St. 1903, c. 459.

Decree affirmed with costs.

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HENRY KEATING *vs.* R. A. J. HEWATT & another.

Berkshire. September 10, 1912. — October 15, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Employer's liability. *Pleading, Civil*, Answer.

One who was the overseer of the mule spinning department of a mill, hired and discharged those employed there, kept an account of their time and gave directions generally as to the manner in which the work of the department should be done, may be found to have been a superintendent of the proprietor of the mill within the meaning of R. L. c. 106, § 71, cl. 2.

At the trial of an action under R. L. c. 106, § 71, cl. 2, for personal injuries, sustained while the plaintiff was employed in the mule spinning department of a mill of the defendant and alleged to have been caused by negligence of a superintendent of the defendant, there was evidence tending to show that while the plaintiff was at work at a spinning machine the superintendent directed him to stop the machine and for the purpose of cleaning it to go into a narrow space back of it and between it and another machine, assuring the plaintiff that the other machine, which then was at rest, "would be stopped and everything would be all right." Two or three minutes later, while the plaintiff was at work as directed, and the superintendent and the operator of the other machine were standing at the end of the other machine, the other machine was started without the plaintiff being warned and he was caught on some exposed gearing and was injured. *Held*, that there was evidence of negligence of the superintendent and of due care of the plaintiff.

In an action by an employee against his employer under the employers' liability act, the defense that the plaintiff assumed the risk of the injury which he received is not open if it is not set up in the answer.

Negligent superintendence, for which an employer is responsible under the employers' liability act, is not a risk that is assumed by an employee.

TORT for personal injuries received by the plaintiff on March 14, 1907, while he was employed in the mule spinning department of a mill of the defendants. Writ dated June 26, 1908.

The declaration contained a first count alleging as the cause of the accident a defect in the ways, works or machinery of the defendants, a second count alleging as a cause negligence of a superintendent, and a third count alleging that the accident was due to a negligent failure of the defendants properly to instruct the plaintiff.

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The case was tried before *Fox*, J. The material facts which the jury were warranted in finding are stated in the opinion.

At the close of the evidence the judge ordered the jury to find for the defendants on the first and third counts. The defendants asked the judge to rule as follows:

"2. The plaintiff cannot recover on his second count."

"4. If the jury find that the machine was running when the plaintiff began to clean the machine, at the place where he got caught, and everything was in plain sight, he cannot recover.

"5. If the jury find that the machine that caught the plaintiff was started after the plaintiff began to clean his machine at the place where he got caught, and the plaintiff had an opportunity to leave that place, but did not do so, but continued to work at that place, then he cannot recover."

The judge gave the fourth and fifth rulings and refused to give the second. The jury found for the plaintiff in the sum of $2,000; and the defendants alleged exceptions.

The case was submitted on briefs.

J. F. Noxon & M. Eisner, for the defendants.

T. F. Cassidy & P. J. Ashe, for the plaintiff.

DeCourcy, J. The plaintiff obtained a verdict on his second count, which alleged that his injury was caused by the negligence of a superintendent of the defendants; and the only question raised by the exceptions is whether there was evidence to warrant the verdict.

The place where the accident occurred was in the alleyway between the back of the plaintiff's spinning machine and that of the next machine, which was operated by one Patton. The length of this space was about forty-five feet, and its width thirty inches, except where the rim band and the driving gears, midway on the back of each machine, projected into this space and narrowed it to twelve or fifteen inches. While the plaintiff was engaged in cleaning the part of his machine that extended into the alley he was caught and injured by the gears on Patton's machine.

The jury were warranted in finding that William Chisholm, who had directed the plaintiff to clean his machine at that time, was a superintendent within the meaning of the employers' liability statute. He was the overseer of the spinning room, he hired

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and discharged the help, kept an account of their time, and gave directions generally as to the manner in which the work of the mule spinning department should be performed. Upon the issue of Chisholm's negligence there was evidence that he ordered the plaintiff to clean his machine at about eight o'clock in the forenoon, although the usual time for this work was between eleven and twelve, saying that some of the employees were out and he wanted him, Keating, to do the work of weighing yarn; that the plaintiff, before going into the alleyway to clean his machine, which was then at rest, asked Chisholm "Is that other machine stopped?" and Chisholm answered, "Yes, they are waiting for roping," and further told the plaintiff that "this machine would be stopped and everything would be all right;" that Patton's machine was in fact at rest when the plaintiff began the work of cleaning, but within two or three minutes started up and caught the plaintiff, and that Chisholm was then talking to Patton at the end of the latter's machine. The jury were warranted in construing the language of the superintendent Chisholm as an assurance that he would see that Patton's machine should not be started up, and the plaintiff thereby exposed to the danger of being caught by its gears, until he, Keating, should have finished cleaning the back of his machine; or at least until warning notice should have been given; and it appeared that the plaintiff so understood it. It further could be found that the injury was due solely to the negligent failure of the superintendent to provide this promised protection after he had exposed the plaintiff to danger. For such negligent superintendence the employer is responsible. *Greenstein* v. *Chick*, 187 Mass. 157. *Dunphy* v. *Boston Elevated Railway*, 192 Mass. 415. *Kushnizki* v. *New England Biscuit Co.* 210 Mass. 177.

The exceptions involve also the plaintiff's due care; but this issue clearly was for the jury. Keating testified that the next machine was stopped when he began to clean his own. His work exposed him to no danger while both machines remained at rest. He might well rely to some extent upon the superintendent's assurance that Patton's machine would not be set in motion without warning being given to him. It cannot be said as matter of law that he was careless in failing to observe it starting up while he was giving his attention to his own work on the oppo-

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site side of the alley. And the jury presumably found, under the instruction given upon the defendants' fifth request, that the plaintiff had no opportunity to escape from the danger after Patton's machine was set in motion.

The contention of the defendants that the plaintiff assumed the risk, as matter of law, cannot be sustained. This defence is not set up in the answer; but even if it were, negligent superintendence, for which the defendant is responsible under the employers' liability statute, is not a risk that is assumed by an employee in his contract of employment. *Meagher* v. *Crawford Laundry Machinery Co.* 187 Mass. 586. *Baggneski* v. *Lyman Mills*, 193 Mass. 103. *Mackenzie* v. *New York Central & Hudson River Railroad*, 211 Mass. 586.

Exceptions overruled.

ANNA O. VINE *vs.* BERKSHIRE STREET RAILWAY COMPANY.

Berkshire. September 10, 1912. — October 15, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Street railway.

At the trial of an action against a street railway company to recover for personal injuries alleged to have been caused by the plaintiff being thrown down by the starting of an open electric car of the defendant as he was alighting therefrom, there was evidence tending to show that the car had been stopped in response to a signal by the plaintiff, that the plaintiff then had risen from his seat, had proceeded to the side of the car and was about to step down upon the running board when the conductor, without giving any attention to that part of the car where the plaintiff was alighting, rang the bell for starting the car, the car was started at once and the plaintiff was caused to fall. *Held*, that there was evidence tending to show that the plaintiff was in the exercise of due care and that the conductor was negligent.

It seems, that the facts, that a passenger on an open electric street car which had been stopped to enable passengers to alight, arose from his seat in the middle of the car and proceeded to the side of it in an attempt to alight, after the conductor had rung a bell as a signal for the car to start, whereupon he was thrown down by the starting of the car, are not conclusive evidence of negligence on his part where it also appears that he did not understand the meaning of the ringing of the bell.

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TORT for personal injuries caused by the plaintiff being thrown from an open street car of the defendant by the car being started as she was alighting. Writ dated December 23, 1910.

In the Superior Court the case was tried before *Fox*, J. The plaintiff was the only witness who testified to the circumstances of the accident. The substance of her testimony is stated in the opinion.

At the close of the evidence, the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. If, at the time the signal to start the car was given, the plaintiff was in a position of safety on the floor or body of the car and such signal was heard by her, she cannot recover in this case and your verdict must be for the defendant.

"3. Unless the conductor, by exercising the high degree of care which the law imposes upon him in his conduct towards passengers knew, or should have known, that the plaintiff would be injured or might be injured by the starting of the car, there is no evidence of the defendant's negligence in this case."

The rulings were refused. The jury found for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

The case was submitted on briefs.

H. W. Ely, J. B. Ely & J. D. Lennehan, for the defendant.

C. P. Niles, J. W. Lewis & J. F. Noxon, for the plaintiff.

BRALEY, J. The rulings requested by the defendant could not have been given. It apparently offered no evidence directly controlling the testimony of the plaintiff, from which the jury would have been warranted in finding, that the conductor, who had been informed of the plaintiff's purpose, stopped the car to enable her and other passengers to alight. By this act the defendant assured the plaintiff, that she would have a reasonable opportunity to pass safely to the street, and in appropriate language the jury were so instructed. *Rand* v. *Boston Elevated Railway*, 198 Mass. 569, 571, and cases cited. The only account of what followed appears in the plaintiff's statements, which if believed were sufficient to show, that as the car stopped she arose from her seat nearly in the centre and moved toward the side, where she grasped a stanchion with her right hand, and stood with one foot on the car floor preparing to step down. But before taking

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the step the conductor, who remained on the running board, gave a signal, and the motorman at once turned on the power. The sudden movement forward caused the plaintiff to be thrown forcibly to the running board, where for some distance she was carried with one foot trailing on the ground. It was the duty of the conductor before he gave the signal to use reasonable care to ascertain whether the plaintiff had alighted, and as it further appears that he looked only toward the rear where a passenger was alighting, but gave no attention to that part where the plaintiff stood, the jury could say, that the car was prematurely started. The questions of the plaintiff's due care, and of the conductor's negligence were manifestly for the jury. *McCarthy* v. *Boston Elevated Railway*, 208 Mass. 512, 513 and cases cited. *McDermott* v. *Boston Elevated Railway*, 208 Mass. 104.

It is, however, urged by the defendant, that the plaintiff left her seat, and attempted to alight after the signal had been given, and while the car was moving. But even if this view as to the cause of the accident may be rested on some of her answers in cross-examination, the plaintiff also testified, that although hearing the bell, she did not understand that it was used solely as a signal to the motorman. If she was ignorant of the purpose of the conductor, then even on the defendant's contention, the mere hearing of the bell before any attempt to move to the side of the car after it had been stopped would not of itself be conclusive evidence of negligence, and whether from her experience as a traveller in street cars she should have been held to have known that the invitation had been withdrawn, was for the jury to decide. *Brooks* v. *Boston & Maine Railroad*, 135 Mass. 21. *Merritt* v. *New York, New Haven, & Hartford Railroad*, 162 Mass. 326. *Garland* v. *Boston Elevated Railway*, 210 Mass. 458. The court moreover was not required under the second request to rule upon a part, but only on the whole of the material testimony, and the instructions, that if the plaintiff was injured in attempting to alight while the car was moving she could not recover amply protected the rights of the defendant. *Kellogg* v. *Thompson*, 142 Mass. 76, 80. *McDonough* v. *Miller*, 114 Mass. 94.

Exceptions overruled.

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HENRY L. HIGGINSON & others vs. TREASURER AND SCHOOL HOUSE COMMISSIONERS OF BOSTON.

Suffolk. September 11, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Parks and Parkways. Boston. Back Bay Fens. Statute, Construction. *Equity Jurisdiction,* To restrain unlawful expenditure by municipality.

The park called the Back Bay Fens, which was acquired in fee by the city of Boston for the use of the public under the authority given by St. 1875, c. 185, is held by that city as an agency of government and not as a private corporation, and the Legislature has the power to appropriate it or any part of it to another public use without the consent of the city.

Land appropriated to a public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. By RUGG, C. J.

St. 1911, c. 540, which authorizes the park commissioners of Boston, upon the request of the school house commissioners with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens, does not authorize permission to erect in that park a building to be used not only for the High School of Commerce but also for the administrative offices of the school committee and of the school house commissioners as contemplated by St. 1909, c. 446.

Upon a bill in equity under R. L. c. 25, § 100, by taxable inhabitants of a city to restrain the alleged unlawful expenditure of money for the erection of a school building in a public park, the question, whether the constitutional rights of the owners of property on which a betterment tax was assessed for the laying out and construction of the park would be infringed by the construction of the proposed building, cannot be raised, the persons whose rights thus would be affected not being parties to the suit.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 30, 1912, by twelve taxable inhabitants of the city of Boston against the treasurer and the school house commissioners of that city, to restrain the raising or expenditure of money or the incurring of obligations for the purpose of constructing in the park known as the Back Bay Fens a building for the High School of Commerce or for that school and the administrative offices of the school committee and the board of school house commissioners.

The answer of the defendant school house commissioners alleged that on January 2, 1912, the board of park commissioners of the city of Boston under St. 1911, c. 540, approved the plans for the building in question to be erected within the limits of the

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Back Bay Fens upon a site selected by the defendant school house commissioners with the approval of the school committee.

The case was heard by *Loring*, J., who reserved and reported it for determination by the full court. The material facts are stated in the opinion.

The case was submitted on briefs.

N. Matthews & P. Nichols, for the plaintiffs.

G. A. Flynn, for the defendants.

RUGG, C. J. This is a bill in equity by taxpayers of Boston to restrain certain officers of that city from erecting a building upon a public park known as the Back Bay Fens. This park was established in 1879 under the authority of St. 1875, c. 185. The city of Boston acquired the fee to the lands included within the park, and has expended large sums of money in locating, laying out, constructing and improving it. By St. 1911, c. 540, the park commissioners of Boston (the public board having control of the Back Bay Fens and other parks) were authorized, upon request of the school house commissioners of the city, with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens.

The first question is whether the Legislature has the power to authorize the construction of such a building in a public park of Boston without the consent of the city expressed either by its voters or its city council, and without the exercise of the power of eminent domain. This necessitates an inquiry into the nature and quality of the right and title of a municipality in land acquired by it for park purposes. The park in question was taken by Boston in the exercise of the power of eminent domain. Therefore, no question arises respecting compliance with the terms of a gift, devise, grant or bequest, and considerations which would be decisive under such circumstances are aside from this discussion. *Howe* v. *Lowell*, 171 Mass. 575. See *Cary Library* v. *Bliss*, 151 Mass. 364, 375; *Riverside* v. *MacLain*, 210 Ill. 308; *Lamar Co.* v. *Clements*, 49 Texas, 347. *Cummings* v. *St. Louis*, 90 Mo. 259. *San Francisco* v. *Itsell*, 80 Cal. 57. *Fessler* v. *Union*, 1 Rob. (N. J.) 14. This is the simple instance of a park acquired by the expenditure of public moneys raised by taxation.

Cities and towns are territorial subdivisions of the State created as public corporations for convenience in the administration of

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government. They exercise only the powers which have been conferred by express enactment of the Legislature or by necessary implication from undoubted prerogatives vested in them. They have a twofold character, the one governmental and the other private. In the one they execute the functions and possess the attributes of sovereignty which have been delegated by the legislative department of government; in the other they are clothed with the capacities of a private corporation, and may claim its rights and immunities, and are subject to its liabilities. *Neff* v. *Wellesley*, 148 Mass. 487. *Davies* v. *Boston*, 190 Mass. 194. *Haley* v. *Boston*, 191 Mass. 291. *Kies* v. *Lowrey*, 199 U. S. 233. *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178. *Vilas* v. *Manila*, 220 U. S. 345, 356.

The property of which a city or town has acquired absolute ownership as an agency of the State, and which it holds strictly for public uses, is subject to legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes. This power always has been exercised in this Commonwealth upon some principles of public justice to the communities affected. *Rawson* v. *Spencer*, 113 Mass. 40. *Agawam* v. *Hampden*, 130 Mass. 528. *Springfield* v. *Springfield Street Railway*, 182 Mass. 41. *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49; *S. C.* 196 U. S. 539. The property which a municipality holds in its private capacity is not subject to the unrestricted authority of the Legislature, and no person can deprive it of such property rights against its will, except by the exercise of eminent domain with payment of full compensation. *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509. *Ware* v. *Fitchburg*, 200 Mass. 61, 68. *Codman* v. *Crocker*, 203 Mass. 146, 150.

The precise point is whether the city of Boston in establishing this park acted as an arm of the Commonwealth or as a private corporation in its proprietary capacity. This point has never been decided in this Commonwealth. In several cases, however, the character of land devoted to use as a park or common has been before the court, and expressions indicative of its view have been used. It was said in *Holt* v. *Somerville*, 127 Mass. 408, 411, respecting park land taken under a statute similar to that we are now considering: "The legal title by such purchase

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became vested in the city, not for its own use in a corporate capacity, but in perpetual trust for the use of all who at any time might enjoy the benefit of a public park." In *Clark* v. *Waltham*, 128 Mass. 567, 569, it was decided that the city held "the park, not for its own profit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit." It was held in *Wrentham* v. *Norfolk*, 114 Mass. 555, 562, that the title to an ancient common or training field laid out by the original proprietors was in the town not for its own use in a corporate capacity, but for the benefit not only of inhabitants of the town but of all "who might have occasion to use it." In *Oliver* v. *Worcester*, 102 Mass. 489, 495, it was said respecting a similar common: "The whole common is in one sense dedicated to the public use, as a place of public resort and recreation, over any part of which persons may pass freely, unless restricted for some public and sufficient reason." In *Abbott* v. *Cottage City*, 143 Mass. 521, 525, respecting a park, it was asserted by Mr. Justice Holmes apparently as a proposition too plain to require further discussion, that "the use is in the public at large." In *Attorney General* v. *Abbott*, 154 Mass. 323, while holding that a park could be established by dedication, it was said that the easement was "not in the town, but it is in the public at large." See also *Attorney General* v. *Vineyard Grove Co.* 181 Mass. 507; *Wellington, petitioner*, 16 Pick. 87. In *Commonwealth* v. *Abrahams*, 156 Mass. 57, where rights in Franklin Park, acquired by Boston under the same statute as the Back Bay Fens, were considered, it was said, "The parks of Boston are designed for the use of the public generally." This language was quoted with approval in *Commonwealth* v. *Crowninshield*, 187 Mass. 221, 224.

Several cases have arisen involving the character of the public interest in Boston Common which was dedicated by its owners in 1634 "for the common use of the inhabitants of Boston as a training field and cow pasture." In *Steele* v. *Boston*, 128 Mass. 583, it was said that "The city holds the common for the public benefit, and not for its emolument, or as a source of revenue, and . . . maintains the common solely for the benefit of the public.

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If there is any legal duty to keep the paths in a safe condition, it is solely a public duty." In *Lincoln* v. *Boston*, 148 Mass. 578, 580, it was said as to the Common: "The use of it is dedicated to and belongs to the public. . . . The city cannot let or sell the Common. . . . The ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public." In *Commonwealth* v. *Davis*, 162 Mass. 510, Mr. Justice Holmes said: "There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park dedicated to the use of the public, or over public streets the legal title to which is in a city or town. . . . As representative of the public, it may and does exercise control over the use which the public may make of such places." In *Codman* v. *Crocker*, 203 Mass. 146, at 152, 153, it was said by Chief Justice Knowlton "In different decisions the city has been treated as holding the legal title [to the Common]; but it holds it only as it is an agency of government representing the interests of the public. It has no rights of a private owner, apart from its holding as a representative of the government. As an agency of the government representing the people, it is subject to the control of the Legislature, which may abolish it and establish another agency in its place, or may deprive it of its power to represent the public, or may transfer a part or all of its governmental authority to another creation. . . . We are of opinion that the title of the city is held only in its municipal capacity as an agency of the government for the benefit of the public, and that the power of the Legislature to represent this interest is supreme."

These decisions touching Boston Common, although made respecting land dedicated instead of taken by eminent domain, nevertheless concern the character and nature of the purpose to which common or park land is devoted. A dedication of land by its private owner "for the common use of the inhabitants of Boston" is as strongly restricted to the municipality as is that taken for its park purposes under St. 1875, c. 185.

A critical analysis of St. 1875, c. 185, tends to show that it put upon Boston, so far as that city acted under its provisions, the exercise of a governmental function for the benefit of the general public in the neighborhood of the parks established. Section 16

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permits any city or town adjoining Boston after the act shall have been accepted by the voters to elect park commissioners with powers similar to those conferred upon the Boston Park Commissioners and "to lay out and improve parks within such adjoining city or town in conjunction or connection with any park laid out in Boston." The establishment of parks by the adjoining cities and towns under this statute thus was conditioned upon prior action by Boston, and then the other municipalities could lay out parks only "in conjunction or connection" with some park previously laid out by Boston. The plain implication is that, when a joint enterprise of this sort was completed, it was for the general benefit and use of the public, and that municipal boundaries were to be obliterated so far as concerned reasonable enjoyment of the entire park unit, although its territory may have been furnished by two or more cities or towns.

Playgrounds and public shade trees acquired and maintained by cities and towns are closely analogous in their essential features to parks. In *Kerr* v. *Brookline*, 208 Mass. 190, 191, it was said "the town is not the owner of the playground in any ordinary sense. The property is held under the statute, solely for a public use. R. L. c. 28, § 19." In *Donohue* v. *Newburyport*, 211 Mass. 561, the planting, maintenance and care of shade trees by cities and towns was held to be a purely public service without any element of special advantage to the municipality, undertaken distinctly for the public weal, and not for the private emolument of the municipality.

It has been held frequently that cities and towns are not liable for injuries occasioned to people using public parks, *Veale* v. *Boston*, 135 Mass. 187, *Oliver* v. *Worcester*, 102 Mass. 489, *Lincoln* v. *Boston*, 148 Mass. 578, *McKay* v. *Reading*, 184 Mass. 140, nor for the negligent conduct of park commissioners acting within the scope of their authority. *Holleran* v. *Boston*, 176 Mass. 75. *Blair* v. *Granger*, 24 R. I. 17. The ground of these decisions of necessity is that the maintenance of public parks is the function of an agency of government, and not one resting in any degree upon the property rights of the municipality.

In other jurisdictions it has been held that the use of a public park is not confined to citizens of the municipality in which it is located, but is for all people. *Price* v. *Plainfield*, 11 Vroom, 608, 612. *People* v. *Park & Ocean Railroad*, 76 Cal. 156, 161. It has

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been decided also in substance that the acquisition, control and management of public parks belongs primarily to the State. Municipalities in this particular act as governmental agencies under an authority delegated by the State, and are always subject to the Legislature. *Hartford* v. *Maslen*, 76 Conn. 599, 611. *In re condemnation of land at Nahant*, 128 Fed. Rep. 185, 186. *In re certain land in Lawrence*, 119 Fed. Rep. 453, 454. *Louisville & Nashville Railroad* v. *Cincinnati*, 76 Ohio St. 481, 497. *Daughters* v. *Riley County*, 81 Kans. 548, 552. *Mayor & City Council of Baltimore* v. *Reitz*, 50 Md. 574, 581. See also *Douglass* v. *Montgomery*, 118 Ala. 599, 610; *Hurd* v. *Harvey County*, 40 Kans. 92, 95; *People* v. *Park & Ocean Railroad*, 76 Cal. 156; *West Chicago Park Commissioners* v. *McMullen*, 134 Ill. 170, 178; *Northport Wesleyan Grove Campmeeting Association* v. *Andrews*, 104 Maine, 342, 350; *David* v. *Portland Water Committee*, 14 Ore. 98, 123; *Russell* v. *Tacoma*, 8 Wash. 156.

Passing from a consideration of the authorities to the underlying principles, which in reason must govern, a park of the nature here in question appears to be for the general public rather than for the municipality in its proprietary capacity. The use of the park is in kind analogous to those confessedly public. It closely resembles roads and bridges. These are open to general public travel without reference to the residence of the traveler. The enjoyment of public parks hardly can be restricted to residents of a particular city or town. They cannot be made a source of revenue as may a system of water works or sewerage or gas, electric light or markets. Their use by those most needing them might be prevented by any pecuniary charge. Historically, the advantages derived from parks never have been treated as proper subjects for private enterprise as have the other functions, which, when assumed by the city or town, have been regarded as private. On the contrary, parks in the proper sense to which the public are regularly admitted have been inseparably connected with a public agency. The pleasure resorts authorized by St. 1906, c. 463, Part III, § 34, for street railway companies and kindred places are different in kind from a public park. Although the establishment of this park was permissive and not compulsory, this distinction is not decisive. It is the character of the use which stamps a given municipal venture as public or proprietary.

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Tindley v. *Salem*, 137 Mass. 171, 176. Adopting this as the test, the dominant aim in the establishment of public parks appears to be the common good of mankind rather than the special gain or private benefit of a particular city or town. The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment and enjoyment. We should hesitate to say that the State would be powerless to exert compulsion if a city or town should be found so unmindful of the demands of humanity as to fail to provide itself with adequate public grounds. The municipal spirit which dictates an extensive park system is the same in kind as that which provides fine streets and avenues, beautiful bridges and ample public schools of a high standard of efficiency, all distinctly public in their nature. The end subserved by these instrumentalities is essentially the same general public good.

There are decisions to the contrary by courts of recognized authority. *Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 228. *State* v. *Schweickardt*, 109 Mo. 496, 512. See *People* v. *Mayor of Chicago*, 51 Ill. 17. But they were made before the absolute necessity of public parks as an accompaniment of modern urban congestion had become so apparent as it is now and under a constitution and body of statute and case law differing from our own. We are not inclined to follow them.

Therefore, we are of opinion, both on authority and on reason, that the park here in question was taken and paid for by the city of Boston as an agency of government, and not as a private corporation.

This conclusion is reached without shaking in any degree the authority of *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, but with a full recognition of the soundness of that decision. The reference to parks as among the private property of the city on page 519 of that judgment was an *obiter dictum*, merely by way of illustration, and might be true in many instances of gift, grant, devise, or special dedication. It does not apply to a park acquired as was the Back Bay Fens. It follows that the State has the power to appropriate it to another public use with-

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out the consent of the city. Hence it is not necessary to decide whether the approval of the park commissioners and of the school committee constituted an assent by the municipal corporation.

St. 1875, c. 185, § 3, authorized the taking of the land in fee. In this respect the statute is constitutional and vested an absolute title in the city for the public benefit. *Dingley* v. *Boston*, 100 Mass. 544. *Page* v. *O'Toole*, 144 Mass. 303. *Conklin* v. *Old Colony Railroad*, 154 Mass. 155. *Titus* v. *Boston*, 161 Mass. 209. *Newton* v. *Perry*, 163 Mass. 319. *Burnett* v. *Boston*, 173 Mass. 173. *Manning* v. *Bruce*, 186 Mass. 282. *Hellen* v. *Medford*, 188 Mass. 42. *Weeks* v. *Grace*, 194 Mass. 296. *Boston* v. *Talbot*, 206 Mass. 82, 90. *Winnisimmet Co.* v. *Grueby*, 209 Mass. 1. The public purpose for which a city has acquired land in fee by the exercise of eminent domain, may be changed by law and the land devoted to some other public use. No private right of reversion intervenes. *Strock* v. *East Orange*, 51 Vroom, 619. *Seattle Land & Improvement Co.* v. *Seattle*, 37 Wash. 274. *McNeil* v. *Hicks*, 34 La. Ann. 1090, 1093. *Brooklyn* v. *Copeland*, 106 N. Y. 496, 501. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234, 243. *Malone* v. *Toledo*, 28 Ohio St. 643. *Eldridge* v. *Binghamton*, 120 N. Y. 309. *Clark* v. *Providence*, 16 R. I. 337. The Legislature in making such designation of a new public use represents the public, and its determination is final. *Prince* v. *Crocker*, 166 Mass. 347. *Codman* v. *Crocker*, 203 Mass. 146, 150.

It remains to ascertain the will of the legislature as manifested in its statutes. We are of opinion that the statutes upon which the defendants rely do not show a legislative intent to permit the erection of the kind of building here proposed. The construction of the projected building three hundred feet long and one hundred and fifty feet wide and more than sixty feet high is wholly inconsistent with the use of the land covered by it and in its immediate vicinity for a park. Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360. *Quincy* v. *Boston*, 148 Mass. 389. *Old Colony Railroad* v. *Framingham Water Co.* 153 Mass. 561, 563. *Boston & Albany Railroad* v. *Cambridge*, 166 Mass. 224. *Eldredge* v. *County Commissioners*, 185 Mass. 186. The policy of the Commonwealth has been to add to the common

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law inviolability of parks express prohibition against encroachment by buildings, highways, steam or street railways. R. L. c. 53, §§ 17 and 20; c. 28, § 11. The defendants rely upon St. 1911, c. 540, for the necessary legislative permission. This act allows the "erection of a building for the High School of Commerce within the limits of the Back Bay Fens." The building, which it is proposed to erect, is to be used not only for the High School of Commerce but also for the administrative offices of the school committee and the school house commission of the city of Boston. Twenty-one per cent of the building is to be devoted exclusively to these administrative offices, and only the remainder to the High School of Commerce and for corridors, heating, ventilating and other general needs of the building. Thus it appears that a very substantial part is for uses other than those permitted by St. 1911, c. 540. The defendants urge that this statute should be read in connection with St. 1909, c. 446 (which authorized the construction of a building for both purposes and the taking of land therefor) and the two acts treated as parts of a legislative unit. But this involves too great a stretch of the language used. It would have been simple to employ words in 1911 plainly indicative of an intent to authorize the construction of the building contemplated by the Legislature of 1909. The failure to make unequivocally clear such a purpose strongly points as matter of construction to a legislative intent to permit only the building for the High School of Commerce. The firmly settled and frequently declared policy of the Legislature heretofore has been to preserve public parks free from intrusion of every kind which would interfere in any degree with their complete use for this public end. It cannot be assumed that this policy is to be lightly thrown aside. It might well be that relaxation in favor of a High School of Commerce was thought wise, but that a building to include also the administrative offices of the school committee and the school house commission of a great city, to which many more people would resort and in considerable part for business rather than educational purposes, was deemed inexpedient. The two statutes are more easily susceptible of a construction, which does not bind them together as a single piece of legislation. There does not seem to be justification under all the circumstances for construing them as a unit. The city, there-

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fore, has no authority to expend money for the erection upon the Back Bay Fens of the kind of building proposed, but only for one to be used exclusively as a High School of Commerce.

The parties have requested a decision of the question whether the constitutional rights of the owners of property, on which was assessed a betterment tax for the layout and construction of the Back Bay Fens, would be invaded by the construction of such a building as is authorized by St. 1911, c. 540. But it was said in *Prince* v. *Crocker*, 166 Mass. 347, 362, that such a question was not in issue on a taxpayers' bill. In justice it cannot be determined without hearing the parties whose property rights are claimed to be involved. *Lawrence* v. *Smith*, 201 Mass. 214.

Injunction to issue.

ARNOLD L. CARROLL *vs.* EMMETT F. HASKINS.

Franklin. September 17, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Sale, Delivery.

In pursuance of an agreement that a debt should be paid in hay at a certain price per ton, the parties went to a barn where two "bents" separated only by a post contained six or seven tons of hay, of which the creditor agreed to buy four and a half tons. The hay in one of the bents was measured and was found to fall short of that amount by somewhat less than a ton. The owner refused to sell the hay in the other bent but agreed that the buyer could take from it enough to make up the amount sold. He gave a bill of sale for four and a half tons of hay in his barn to be removed by the buyer at any time. Before removal by the buyer the hay was attached as the property of the seller. In an action by the buyer against the attaching officer for an alleged conversion, it was *held*, that it could be found that there had been a constructive delivery of the part of the hay which had been identified by measurement although it had not been separated physically from the hay in the adjoining bent and that the title to such part had passed to the plaintiff.

TORT against a deputy sheriff for the alleged conversion of certain hay attached by the defendant as the alleged property of one LaPierre. Writ in the District Court of Franklin dated March 29, 1909.

On appeal to the Superior Court the case was tried before

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Fessenden, J. It appeared from the evidence that the plaintiff had worked for LaPierre on his farm, and that it was agreed between them that the plaintiff should be paid for his work in hay at $10 a ton, that on December 26, 1908, the plaintiff went with his father to the barn of LaPierre where a bargain was made for the sale to the plaintiff of four and a half tons of hay from about six or seven tons contained in two "bents," that the plaintiff's father and LaPierre measured the hay in the northeast bent and found it to be short of four and a half tons by somewhat less than a ton, that LaPierre said that he would not sell the other hay but that the plaintiff might take enough out of the next bent to make up the required amount, that LaPierre gave to the plaintiff a bill of sale for "four and one half ton of hay in my barn said hay to be removed by said Carroll at any time," and that later when the plaintiff went for the hay it had been attached by the defendant.

The father of the plaintiff on his cross-examination testified as follows: "Q. What separated the bents? A. A post. Q. So that the hay in this bent was interlaced with the hay in the next bent? A. Yes; it lies right from one post to the other. Q. In order to get it out it would have to be cut down with a knife? A. Yes, cut it down." The plaintiff on his cross-examination testified as follows: "Q. You did not in fact take the hay from the other bent? A. No, sir. Q. You did not cut the hay between the two bents? A. I never touched the hay at all, did n't get a chance to."

It was agreed that on February 3, 1909, the defendant attached the hay on a writ against LaPierre. At the close of the plaintiff's evidence the defendant asked the judge to rule, that as a matter of law on all the evidence the jury would not be justified in finding any delivery of the hay or any portion thereof. The judge refused to make this ruling, and instructed the jury "that they could not find for the plaintiff for the hay which was not in the northeast bent but must be restricted to the hay in that bent if they found a delivery thereof to the plaintiff."

The jury found for the plaintiff in the sum of $38.02; and the defendant alleged exceptions.

W. A. Davenport, for the defendant.

F. J. Lawler, for the plaintiff.

BRALEY, J. While as between the parties to the sale the title

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passed to the plaintiff if the jury believed the evidence, yet the defendant, who as a deputy sheriff subsequently attached the property on a writ against the seller, is not liable for conversion unless there also was proof of actual or constructive delivery. *Marsh* v. *Hyde*, 3 Gray, 331, 333. *Packard* v. *Wood*, 4 Gray, 307. *Harlow* v. *Hall*, 132 Mass. 232. *Clark* v. *Williams*, 190 Mass. 219.

The evidence showed a bargain for the purchase in satisfaction of a debt due from the seller to the buyer of four and one half tons of hay, stored in two "bents" distinguished from each other by a post, and containing some six or seven tons. Upon the day following the agreement the parties went to the barn where in their presence the "bent" in the northeast corner was measured, and, the contents having lacked less than a ton of the amount purchased, the seller, although he declined to sell the hay in the adjoining "bent," agreed, that the plaintiff could take therefrom enough to supply the deficiency, and gave a bill of parcels for the full quantity. It is not contended that the sale was made to defraud creditors, even if the plaintiff was given permission to remove the hay at his own convenience, and from the language and conduct of the parties the jury could find, that the seller for a valuable consideration, and in good faith, actually intended to part with possession, and the plaintiff intended to accept the transfer. *Riddle* v. *Varnum*, 20 Pick. 280. *Foster* v. *Ropes*, 111 Mass. 10. By the act of measurement the line of demarcation could be ascertained, and the subject of the controversy could have been identified, even if not physically separated from the other hay, as having been covered by the contract of sale. The bulky nature of the property having precluded manual possession unless the plaintiff had immediately taken the hay away, constructive delivery under the circumstances was sufficient, and the transaction resulted in the sale of specific goods where nothing further remained to be done. Nor is it material that the quantity measured was less than the amount bargained for. The attaching creditor in the absence of fraud obtained no greater rights than those possessed by his debtor. It follows that under appropriate instructions, which were given, the jury could further find that as to subsequent purchasers for value and without notice the property had vested in the plaintiff. *Jewett* v. *Warren*, 12 Mass. 300. *Arnold* v. *Delano*, 4 Cush. 33, 40. *Stinson* v.

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Clark, 6 Allen, 340. *Ingalls* v. *Herrick*, 108 Mass. 351. *Hobbs* v. *Carr*, 127 Mass. 532. *Whittle* v. *Phelps*, 181 Mass. 317. *Parry* v. *Libbey*, 166 Mass. 112. *Wesoloski* v. *Wysoski*, 186 Mass. 495. *Garvan* v. *New York Central & Hudson River Railroad*, 210 Mass. 275, 280. See St. 1908, c. 237, § 18. The defendant's request was rightly denied, and the exceptions must be overruled.

So ordered.

EDWIN POOLE *vs.* BOSTON AND MAINE RAILROAD.

Franklin. September 17, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Railroad, *Res ipsa loquitur*. *Evidence*, Presumptions and burden of proof.

At the trial of an action against a railroad corporation for personal injuries caused by a collision in the night-time at a grade crossing of the defendant's railroad and a highway between a carriage in which the plaintiff was riding and freight cars of the defendant, there was evidence tending to show that, just before the carriage reached the crossing, the plaintiff saw a train pass, that after the passing of the train and just before the collision the crossing was clear, that on the crossing the carriage was struck by two cars and a caboose which had become detached from the preceding train and had approached the crossing with no light, no warning signal and without a rear brakeman at his post of duty, that the crossing was unguarded, and that the main body of the train after the collision stopped fourteen hundred feet and the three detached cars only from five to seven car lengths beyond the crossing. There was no evidence of any curve or grade in the track at the crossing or of any defect in the cars that would account for the train breaking apart. *Held*, that there was evidence that the collision was caused by negligence for which the defendant was responsible.

In an action against a railroad corporation by a traveller on a highway who was injured in a collision at a grade crossing between a carriage in which he was and three cars which had become detached from a freight train that had just gone over the crossing and which were proceeding without any light or warning signal and without a rear brakeman at his post of duty, the fact, in the absence of any explanation, that the train had broken apart while the track and cars were under the exclusive control of the defendant, will warrant a jury in inferring negligence on the part of the defendant.

In an action against a railroad corporation for personal injuries sustained in a collision at a grade crossing of a highway with the defendant's railroad, there was evidence tending to show that as the plaintiff in a carriage driven by another person was approaching the crossing in the night-time he saw a freight train pass in front of them, that the driver held up the horse before proceeding over the

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track, and that the plaintiff looked in both directions on the track and listened and heard only the rumble of the train that had passed, that when the carriage reached the crossing it was struck by three cars which had become detached from the rear of the train that had just passed and which were proceeding without a light or a warning signal and with the rear brakeman absent from his post of duty. *Held*, that findings were warranted that both the plaintiff and the driver of the carriage were in the exercise of due care.

TORT at common law for personal injuries caused by a collision, at a grade crossing of the defendant's railroad with Water Street in Orange, between a carriage of one Baker in which the plaintiff was and a freight train of the defendant or cars detached therefrom. Writ dated December 14, 1911.

In the Superior Court the case was tried before *Fessenden*, J. There was evidence for the plaintiff tending to show that Baker and the plaintiff had driven to Athol from Orange to have some empty beer bottles of the plaintiff filled and were returning to Orange at eleven o'clock at night when the accident occurred. The plaintiff, who was the only witness as to his relations with Baker, testified that he knew of no other errand that Baker had that occasioned the journey to Athol. Baker was killed by the collision. Other evidence on the question of the due care of the plaintiff and of Baker is stated in the opinion.

There was evidence tending to show that, after the collision, marks were found as of something that had run into the side of the two cars just ahead of the caboose, had scraped the paint and had jammed the woodwork, that horse hairs were found on some of the iron work of the second car from the caboose, and that on the rear steps of the caboose on the side from which the team had approached there were indications of blood and of human brains. Other evidence as to the circumstances of the collision is described in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Davenport, for the plaintiff.

D. Malone, for the defendant.

DECOURCY, J. About eleven o'clock on the night of May 17, 1911, a collision occurred at a grade crossing on Water Street in the town of Orange, between a carriage in which the plaintiff was riding and an east-bound freight train of the defendant; and one Baker, the owner and driver of the horse, was killed and the plain-

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tiff was seriously injured. This action is based upon the alleged common law negligence of the railroad and is here on exceptions to the order of the trial judge directing a verdict for the defendant.

1. On the issue of the defendant's negligence there was evidence entitling the plaintiff to go to the jury. It is admitted that the rear car or caboose broke away from the train, and the plaintiff contends that the marks upon the next two cars indicate that they also left the rest of the train at the same time. The jury were not compelled to believe the testimony of the trainmen, that the separation of the train occurred on the crossing. On the contrary they could accept the plaintiff's statement that as the carriage approached the tracks he saw the train pass, and that the crossing was clear just before the collision; and they could infer therefrom that the caboose, and possibly two coal cars, became detached from the train before reaching Water Street. Further, there was no curve or grade at the crossing, and no defect in the cars was testified to that would account for a breaking apart of the train at that place; and there was evidence that when all the cars came to a stop after the accident, the caboose was only from five to seven car lengths away, while the main portion of the train was about fourteen hundred feet distant.

In the absence of explanation, the fact that the freight train broke apart when the track and cars were under the exclusive control of the defendant, would warrant the jury in inferring negligence, in an action by one who was not its employee. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, 19. The only explanation suggested by the defendant is that the horse was driven into the side of the train, and that the wagon or horse caused the front end of the caboose, which weighed more than twenty tons, to be raised high enough to lift one knuckle over the other in a coupler that was six inches in height. This explanation the jury might regard as inherently improbable and disproved by the fact that only slight damage was done to the horse and wagon. And they might find direct evidence of negligence in conduct which allowed cars detached from a train, without lights or warning signal and with the rear brakeman absent from his post of duty, to pass over an unguarded grade crossing.

We have not considered the case as brought under St. 1906, c.

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463, Part II, § 245, for failure to give the required statutory signals in approaching the crossing of a public way. The declaration does not set forth this cause of action; *Fuller* v. *Boston & Albany Railroad*, 133 Mass. 491; and the statute is inapplicable to a collision with a car that has broken away from a train under circumstances like those on which the plaintiff relies. *Rodriques* v. *New York, New Haven, & Hartford Railroad*, 210 Mass. 305.

2. The issue of the plaintiff's due care was also for the jury, whether he be judged by his own conduct or regarded as identified with Baker in the joint prosecution of a common purpose and so subject to the doctrine of imputed negligence. *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309. It could not be ruled as matter of law that the driver Baker was negligent. There was evidence that when the carriage was approaching the tracks a freight train passed over the crossing, undoubtedly the one from which, as it later appeared, the caboose had broken away. There was no reason to suppose that another train would follow immediately after this one which was seen and whose retreating rumble was heard. Nevertheless the driver held up his horse before proceeding over the tracks, and the plaintiff testified that he himself then looked in both directions and listened. Whether reasonable care would have disclosed to the sight or hearing of either of them the approach of the car or cars that had parted from the train was a question for the jury.

Exceptions sustained.

DOMENICO SPOATEA *vs.* BERKSHIRE STREET RAILWAY COMPANY.

Berkshire. September 23, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, Street railway.

Evidence, that one riding a bicycle in the night-time on a wide street became so blinded by a "large night reflector" headlight on a street car coming round a curve that he was unable to guide his bicycle and ran into a team at a place where there was plenty of room for him to pass the team without collision if he had not become blinded by the light, that the light was "the same light on the cars that" he had seen "them ordinarily use," and that the track of the street railway was at the side of the street, is not sufficient to show that the injury to the rider was caused by negligence in the use of the light.

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TORT for personal injuries received by a collision in the night-time between the plaintiff, riding on a bicycle, and a team on the highway, alleged to have been caused by the plaintiff becoming blinded by a headlight of great power used on a street car of the defendant. Writ dated August 2, 1909.

In the Superior Court the case was tried before *McLaughlin*, J. The plaintiff was the only witness. Material portions of his testimony are stated in the opinion. At the close of his testimony the plaintiff rested, and at the request of the defendant the judge ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

M. E. Couch, for the plaintiff.

H. W. Ely & J. B. Ely, for the defendant.

RUGG, C. J. The plaintiff traveling in the night-time upon a bicycle on a highway was injured by collision with a team. It is sought to fasten liability upon the defendant because a headlight upon one of its cars proceeding on its track dazzled the plaintiff so that he ran into the team. The plaintiff testified: — "The light blinded me, I was unable to guide my bicycle. . . . It blinded me for the moment and I could not see; . . . it was one of those large night reflectors. . . . It was the same light on the cars that I saw them ordinarily use, that is about the same. . . . The light was thrown upon me as it rounded a curve. I was coming down the hill, straight down when the car rounded the curve." The plaintiff saw the team a few steps ahead. The street was wide, and the tracks of the defendant were on its side, and there was plenty of room to pass without collision but for the blinding effect of the light.

This, in substance, is the plaintiff's case. It is too meagre to show any negligence on the part of the defendant, either in the character or management of the light or in the running of the car. At most, there appears to have been only a momentary blinding of the plaintiff, as the rays from a headlight such as are in common use included him in their range for an instant while the car came around a curve. More facts than these must appear before it can be said that there was fault in the use or operation of the light or car.

Exceptions overruled.

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WILLIAM W. BELLOWS & another *vs.* CHARLES McKENZIE & another, administrators.

Hampden. September 24, 1912. — October 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & DECOURCY, JJ.

Sale, Delivery. *Damages*, In contract.

Where one agreed in writing to purchase a trustee's receipt representing five hundred shares of the stock of a corporation for the total price of $2,000, of which he paid $200 in cash on account and agreed to pay the balance on certain dates named, and thereafter the seller procured a trustee's receipt representing the shares made out in the name of the purchaser and held it ready for delivery upon payment of the balance of the purchase money, and the purchaser expressed his willingness to pay for it but stated his inability to raise the necessary money and asked for an extension of the time of payment, it was *held*, that it properly might be found, upon evidence showing the circumstances of the transaction, that the parties intended the title to the property to pass to the buyer, subject to the lien of the seller for the unpaid balance of the purchase money, and that, upon the failure of the buyer to pay such balance, the seller could recover it in an action of contract.

CONTRACT, upon the declaration printed below. Writ dated December 10, 1908.

The declaration was as follows:

"And the plaintiffs say that the defendants' intestate made and entered into a written contract with the plaintiffs, a copy of which contract is hereto annexed, whereby and according to the terms whereof, the defendants' intestate agreed to purchase a Trustee's receipt for five hundred shares of the Utah-Bingham Mining Company at $4 per share and at the time of making said contract the defendants' intestate paid to the plaintiffs the sum of $200 on account of the contract price and agreed to pay the balance, to wit: the sum of $1800 on the date set forth in said written contract, and the plaintiffs further say that they have fully performed their part of said written contract, made and entered into between them and the defendants' intestate, but that the defendants' intestate failed and neglected and refused to perform his part of said written contract, and failed and neglected and refused to pay the plaintiffs said sum of $1800, although often demanded so to do,

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and the plaintiffs say that they have demanded of the defendants the balance due on said contract, which sum the defendants have failed and neglected and refused to pay, and the defendants owe the plaintiffs the sum of $1800 and interest thereon from March 1, 1906."

Copies annexed to the plaintiffs' declaration were as follows:

"No. 560 Springfield, 1 March, 1906.

Bellows Brothers,

Gentlemen: Allow me to order hereby Trustee's receipt for five hundred shares of the Utah-Bingham Mining Company at $4.00 per share for which I herewith pay $200 — and agree to pay the balance ($1800) by note payable as follows: in 6 and 12 mos. and oblige. This order carries with it an option on five hundred shares more at the same price for a period of 6 months from March the first. Order fow'd.

"J. C. Robertson."

"Spg. Mass. April 24/06.

"In connection with an order placed by Mr. J. C. Robertson with the firm of Bellows Bros. on March the first, 1906, it is understood and agreed that the giving of the note stated therein is hereby waived, but the payments are to stand as stated by agreement herewith.

To this agreement both parties hereunto set their signatures.

6 per cent interest will be charged on all balance.

Bellows Bros.

J. C. Robertson."

The defendants' answer contained a general denial and by way of equitable defense alleged fraud in the transaction.

In the Superior Court the case was heard by *Hardy*, J., without a jury. At the close of the plaintiffs' evidence the defendants rested and asked the judge to make the following rulings:

"1. That under the pleadings of the case it is not open to the plaintiffs to prove a sale of the shares of stock of the Utah-Bingham Mining Company and they cannot recover the balance of the purchase price therefor.

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"2. If the trustee's receipt was never delivered or tendered to the defendants' intestate there was no transfer of title of the shares to him and the contract sued upon was an executory contract for purchase and not an executed contract of purchase.

"3. That the measure of damages is the difference between the market value of the shares at the time of the breach of the contract and the contract price.

"4. If the plaintiffs introduce no evidence as to such difference they are entitled to nominal damages."

The judge refused to make any of these rulings. He found that the contracts were made between the parties as set forth in the copies annexed to the declaration and that there was a waiver of the giving of the notes in accordance with the subsequent stipulation. He found that the allegations of fraud set forth in the answer were not sustained.

The judge also made the findings which are stated in the opinion. He found for the plaintiffs for the balance of the purchase price as claimed in the declaration; and the defendants alleged exceptions. The bill of exceptions contained no statement of evidence. It contained the statement that "the question presented by these exceptions relates entirely to the measure of damages."

The case was submitted on briefs.

R. A. Knight & E. H. Brewster, for the defendants.

C. S. Ballard & C. J. Weston, for the plaintiffs.

DeCourcy, J. As stated in the bill of exceptions, "the question presented . . . relates entirely to the measure of damages," the defendants contending that the proper measure of damages is the difference between the market value of the shares and the contract price, and that the trial judge erred in awarding to the plaintiffs the balance due upon the contract.

The evidence on which the decision was based is not before us. From certain findings of fact filed by the judge, it appears that J. C. Robertson, the defendants' intestate, on March 1, 1906, gave to the plaintiffs a written order for a "trustee's receipt for five hundred shares of the Utah-Bingham Mining Company at $4.00 per share;" paying $200 on account, and agreeing to pay the balance in six and twelve months. Subsequently the plaintiffs procured the receipt or certificate in the name of J. C. Robertson as owner which was to be delivered to Robertson on payment of the balance

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of the purchase money. Presumably the judge found that this arrangement was made with the consent of Robertson. Among other things the memorandum states: "I find from the course of the correspondence between the parties that the defendants' intestate expressed his willingness to pay for the same, but also stated his inability to raise the necessary money and asked for an extension of time."

The finding in favor of the plaintiffs for the balance of the purchase price must have been based upon the judge's conviction that the evidence of the entire transaction between the parties, of which the written order was only a portion, established a case of an executed sale, and not merely an executory agreement to purchase. In the absence of the evidence clearly we cannot say that such conclusion was not warranted. On the contrary, it would appear from the record that the parties intended the title of the trustee's certificate to pass, and that the plaintiffs had done all they had to do in order to divest themselves of the property in the stock and to effect a complete transfer thereof to Robertson. The trustee's certificate was appropriated to the defendants' intestate, and he could obtain actual possession at any time upon payment of the balance of the price. Here could be found at least a completed bargain and sale, with transfer of title; and upon the buyer's refusal to pay, the seller was entitled to recover the purchase price, notwithstanding his retention of a lien therefor. *Thompson* v. *Alger*, 12 Met. 428. *Frazier* v. *Simmons*, 139 Mass. 531. *Mitchell* v. *Le Clair*, 165 Mass. 308. *Obery* v. *Lander*, 179 Mass. 125.

In view of the express stipulation in the exceptions that they relate entirely to the measure of damages, and the uncontradicted statement in the plaintiffs' brief that the first and second requests for rulings were waived by the counsel for the defendants, we do not consider that any question of pleading is now before us. It may be said, however, that it sufficiently appears by the declaration that the plaintiffs relied upon a completed sale and not upon an executory contract to sell.

Exceptions overruled.

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ACCORD AND SATISFACTION.

In an action on a promissory note, which was given to the plaintiff for a loan of money made by him to be used for the purpose of procuring for certain persons a controlling interest in the capital stock of a corporation, it was held on the evidence to be a question of fact for the jury whether certain shares of the corporation in question held by the plaintiff had been accepted by him in satisfaction of his claim. *Young* v. *Hayes*, 525.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADOPTION.

Under a will, which contains certain bequests to a son of the testator and makes no mention of a child or issue of the son, an adopted child of the son takes nothing if the son dies before the testator. *Gammons* v. *Gammons*, 454.

ADVERSE POSSESSION.

For the purpose of proving a title to land by adverse possession evidence of a gift of the land by parol is competent to show the character of the possession. *Enfield* v. *Woods*, 547.

In a suit in equity by a town founded on the plaintiff's title to a tract of land used by it as a common, which the plaintiff contended that it had acquired by adverse possession, a finding by a master "that the town . . . its selectmen and citizens generally have laid claim to said land as the property of the town . . . ever since a time prior to the year 1814" is a finding that the claim was asserted by corporate action, if such action was necessary. *Ibid.*

In such suit, the defendant's case was that her husband had acquired title to the land by adverse possession, and it was held that it was competent for the plaintiff to show, by introducing in evidence "valuation lists" of the town by which it appeared that no tax had been assessed to any one during those years, that throughout the twenty-three years during which the defendant contended that her husband was in exclusive adverse possession of the land he never had paid a tax upon it. *Ibid.*

Certain evidence which, upon the issue whether a town had acquired title to a tract of land for use as a common by adverse possession which began by a parol gift, was held to be admissible under the exception to the rule

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excluding hearsay evidence which allows the admission of evidence of a general or common reputation as to a matter of public or general interest. *Enfield* v. *Woods*, 547.

Case in which it was held that St. 1906, c. 463, Part II, § 80, did not prevent the owner of land subject to an easement of a railroad corporation from using it continuously and openly and then contending that the corporation had abandoned its easement. *Ames* v. *Boston & Albany Railroad*, 421.

AGENCY.

Existence of Relation.

Under St. 1896, c. 516, incorporating the Boston Terminal Company to own, operate and maintain the south terminal station in Boston, and rules adopted by that company governing the way in which trains should be operated in the station, it was held that the employees of a railroad company while they were in charge of a train of the railroad company in the station remained servants and agents of the railroad company. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

Where a contractor is engaged in constructing for a railroad company an abutment for a bridge to be placed across the railroad under a contract which provides that the work shall be done under the general direction of a civil engineer of the railroad company, and the contractor, being obliged to get certain elevations and lines from the engineer, sends one of his employees to do in that regard what he is asked to do by the engineer, such employee while performing such duty under the engineer's direction does not become a servant of the railroad company. *McLellan* v. *Boston & Maine Railroad*, 153.

A seaman who was hired by the master of an unchartered vessel may maintain an action for his wages against either the owner or the master; but he cannot maintain an action against both of them because the liability of the owner is based upon an implied authority of the master to contract on his behalf, and the bringing of an action against the master is an election to treat him and not the owner as the principal. *Bingham* v. *Monroe*, 455.

"Exclusive" Agency.

Action by a dealer in automobiles against a manufacturer for breach of a contract appointing the dealer the manufacturer's "exclusive agent" for the sale of his goods for a specified time and within a specified territory. *Randall* v. *Peerless Motor Car Co.* 352.

Scope of Authority.

"Special agents" of certain fire insurance companies were held as matter of law under the circumstances to have no authority to waive for their respective companies the requirement of the sworn statement by the insured contained in the Massachusetts standard form of policy. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

Certain evidence, tending to show that the son of a lender of money by his authority procured a note payable to the lender's order for the amount lent signed as maker by one of four persons interested and indorsed by another of them and by the lender's son, was held not to be evidence that

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the lender authorized his son to act as his agent in signing a subsequent agreement under seal relating to the joint enterprise, which was executed by the four persons engaged in the enterprise and by the lender's son in the son's own name. *Young* v. *Hayes*, 525.

One who was the overseer of the mule spinning department of a mill, hired and discharged those employed there, kept an account of their time and gave directions generally as to the manner in which the work of the department should be done, may be found to have been a superintendent of the proprietor of the mill within the meaning of R. L. c. 106, § 71, cl. 2. *Keating* v. *Hewatt*, 577.

In an action by an administrator against the proprietor of a barroom for injuries to the plaintiff's intestate which resulted in his death, it was held that from facts in evidence it could have been found that, in ejecting the intestate, bartenders in the defendant's employ were acting within the scope of their duties in the preservation of order, and that on such a finding the defendant would be liable for their acts done in the performance of this duty, even if they used unnecessary force. *Murphy* v. *Bay State Wine & Spirit Co.* 285.

Ratification of Unauthorized Acts.

An assessment of betterments by the board of street commissioners of Boston for a sewer which had been constructed without their authority was held not to ratify such unauthorized construction. *Sullivan* v. *Mandell*, 174.

Repudiation of Contract of Agency.

A repudiation of a contract of agency by a principal is justified if the agent by a contract with a third person has placed himself under legal obligations inconsistent with those assumed under the pre-existing contract, even though at the time of the repudiation no actual injury has been suffered by the principal and he did not know of the existence of the contract with the third person. *Randall* v. *Peerless Motor Car Co.* 352.

Rescission by Infant Principal.

Avoidance of contracts of an infant with a stockbroker who acted as his agent under his specific orders. *Benson* v. *Tucker*, 60.

Liability of Principal for Breach by Agent of Oral Instructions.

In an action for personal injuries against a corporation operating an elevated railway, it was said that the question, how far evidence of oral instructions given to the guards and brakemen employed upon the defendant's elevated trains, was admissible for the purpose of showing negligence of the defendant, was an open one. *Larson* v. *Boston Elevated Railway*, 262.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Colorable Agency not protecting Real Principal.

In a suit in equity against an individual for the rescission of purchases of shares of the capital stock of a corporation because of fraud of the

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defendant, it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not of controlling significance, it appearing that the "treasury stock" was practically owned by the defendant and that the treasurer was the defendant's agent in the transaction. *Ginn* v. *Almy*, 486.

ARBITRAMENT AND AWARD.

Arbitration under an agreement, relating to the ascertainment of the amount of loss sustained by the insured in a Massachusetts standard policy of fire insurance, which was held not to have waived the right of the company to insist upon the statements by the insured called for by the policy. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

ASSAULT.

In an action by an administrator against the proprietor of a barroom for injuries to the plaintiff's intestate, which resulted in his death, it was held that from facts in evidence it could have been found that, in ejecting the intestate, bartenders in the defendant's employ were acting within the scope of their duties in the preservation of order, and that on such a finding the defendant would be liable for their acts done in the performance of this duty, even if they used unnecessary force. *Murphy* v. *Bay State Wine & Spirit Co.* 285.

In the same action it further was held that if the facts were regarded as showing two separate assaults instead of a continuous one in which two bartenders participated, it was unnecessary to decide whether the evidence would warrant a finding that one of them was acting within the scope of his authority, because at any rate the plaintiff would be entitled to go to the jury in regard to the assault committed by the other. *Ibid.*

ASSESSMENT.

See that subtitle under TAX.

ASSIGNMENT.

Assignment of a contract between the assignor and a building contractor which was held to have become ineffectual because the contract had been rescinded by agreement of the parties to it. *Homer* v. *Shaw*, 113.

ATTACHMENT.

Landlord's right, in an action for an arrearage of rent to attach his tenant's personal property on the leased premises and then to terminate the lease and prevent the tenant from removing personal property not exempt from attachment. *Chetteville* v. *Grant*, 17.

Under a writ of attachment in an action of contract against the proprietor of a tailoring business conducted in two rooms, each connected with a corridor, one room being used as a workroom by the employees of the establishment

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and the other for dealing with customers, a constable has no right against the wishes of the defendant to place a lock upon the door leading from the corridor into the workroom and to keep the defendant and his employees from using that door. *Chetteville* v. *Grant*, 17.

ATTORNEY AT LAW.

Suit in equity for an accounting against an attorney at law, in which it was held that the defendant committed a breach of trust and a fraud upon the plaintiff by receiving personally certain property in return for the surrender of a claim of the plaintiff entrusted to him for collection and the surrender of another claim in which the plaintiff had no interest, and the defendant was held to account for the property so received. *Kelly* v. *Allin*, 327.

ATTORNEY GENERAL.

Under the provision of R. L. c. 37, § 9, the validity of a gift to a church of property yielding an income in excess of $2,000 a year can be brought in question only by the Commonwealth; but this may be done by the Attorney General on becoming a party to a suit which was not instituted by him. *Chase* v. *Dickey*, 555.

AUTOMOBILE.

Action for breach of a contract by which the plaintiff was appointed the defendant's "exclusive agent" for a year to sell the defendant's automobiles in a specified territory. *Randall* v. *Peerless Motor Car Co.* 352.

Action for personal injuries resulting from negligence in the use of automobiles, see NEGLIGENCE, *In Use of Automobile.*

BACK BAY FENS.

The park called the Back Bay Fens, which was acquired in fee by the city of Boston for the use of the public under the authority given by St. 1875, c. 185, is held by that city as an agency of government and not as a private corporation, and the Legislature has the power to appropriate the whole or any part of it to another public use without the consent of the city. *Higginson* v. *Treasurer of Boston*, 583.

St. 1911, c. 540, which authorizes the park commissioners of Boston, upon the request of the school house commissioners with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens, does not authorize permission to erect in that park a building to be used not only for the High School of Commerce but also for the administrative offices of the school committee and of the school house commissioners as contemplated by St. 1909, c. 446. *Ibid.*

BICYCLE.

Evidence, in an action by one who, while riding a bicycle in the night-time, became so blinded by a headlight on a street car that he was unable to guide his bicycle and ran into a team and was injured, was held not to

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have been sufficient to show that the injury was caused by negligence in the use of the light. *Spoatea* v. *Berkshire Street Railway*, 599.

BILLS AND NOTES.

Consideration for Indorsement.

Under R. L. c. 73, § 42, a loan of money made to a person, who borrowed and used it for the joint benefit of himself and of other persons undisclosed, is a good consideration for the indorsement by one of such undisclosed persons of a note subsequently given to the lender and accepted by him in discharge of the obligation of the loan. *Young* v. *Hayes*, 525.

Accommodation Maker.

Under R. L. c. 73, §§ 46, 136, 137, if the holder of a negotiable promissory note, knowing that it was made for the accommodation of the payee who indorsed it to the holder, by agreement with such indorser for a valuable consideration extends the time of payment without the consent or knowledge of the accommodation maker, this does not discharge such maker from liability on the note. *Union Trust Co.* v. *McGinty*, 205.

Delivery.

Whether or not delivery of a certain note by an indorser was conditional, was held on the evidence to be for the jury. *Young* v. *Hayes*, 525.

Of Municipal Corporations.

Authority of the clerk and of the treasurer of a town with regard to its promissory notes. *Franklin Savings Bank* v. *Framingham*, 92.

In R. L. c. 73, § 59, relating to the indorsement of a negotiable instrument by a fiscal officer of a bank or corporation, the word "corporation" does not include a town or city. *Ibid.*

Suit to enjoin Action on Note.

Suit in equity against three persons to enjoin the prosecution of an action at law on a promissory note payable to one of the defendants and signed only by the plaintiff, and to determine the rights of the parties under a certain agreement concerning shares of capital stock involved in the same transaction as the note. *Briggs* v. *Boynton*, 5.

BLASTING.

On an appeal from a decree for the plaintiff in a suit in equity to enjoin a nuisance caused by blasting done by the defendant in the construction of a tunnel for use in connection with water works, and to recover damages for injuries to the plaintiff's house and interference with his enjoyment of it, where the evidence was reported, findings of a master were held not to have been plainly wrong. *Stewart* v. *Hanreddy*, 340.

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BOSTON.

Under St. 1897, c. 426, §§ 2, 4, St. 1903, c. 268, the construction of a sewer in the city of Boston can be authorized only by the board of street commissioners with the approval of the mayor, and the superintendent of sewers of that city acting under direction of the mayor has no authority to construct a sewer not authorized by the board of street commissioners. A subsequent assessment by that board of betterments for a sewer so constructed does not operate as a ratification of acts originally unlawful and is void. *Sullivan* v. *Mandell*, 174.

Section 4 of St. 1799, c. 31, which provides "that no canopy, balcony, platform of cellar-door, or step in any street, lane or alley, in the town of Boston, shall project into such street more than one tenth part of the width of the street, and in no case more than three feet," applies to steps below the surface of the sidewalk of a highway, which lead to the basement of a house, and an unguarded opening containing such steps which projects only two feet into a street thirty feet wide is not a defect in the highway for which the city of Boston can be found to be liable under R. L. c. 51, § 18. *Aldrich* v. *Boston*, 512.

The park called the Back Bay Fens, which was acquired in fee by the city of Boston for the use of the public under the authority given by St. 1875, c. 185, is held by that city as an agency of government and not as a private corporation, and the Legislature has the power to appropriate it or any part of it to another public use without the consent of the city. *Higginson* v. *Treasurer of Boston*, 583.

St. 1911, c. 540, which authorizes the park commissioners of Boston, upon the request of the school house commissioners with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens, does not authorize permission to erect in that park a building to be used not only for the High School of Commerce but also for the administrative offices of the school committee and of the school house commissioners as contemplated by St. 1909, c. 446. *Ibid.*

BOSTON TERMINAL COMPANY.

One, who is waiting in the south terminal station in Boston outside a fence separating the tracks and the platforms between them from the rest of the station, and who has purchased a ticket and intends to board a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, is not a passenger of such railroad company. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

Under St. 1896, c. 516, incorporating the Boston Terminal Company to own, operate and maintain the south terminal station in Boston, and rules adopted by that company governing the way in which trains should be operated in the station, it was held that the employees of a railroad company while they were in charge of a train of the railroad company in the station remained servants and agents of the railroad company, and that the railroad company was liable for the consequences of their negligent acts. *Ibid.*

In the same action it was held that there was evidence warranting a finding that negligence of both the railroad company and the terminal company

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caused the plaintiff's injury, and that both might be held liable therefor as joint tortfeasors. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

BROKERS.

STOCKBROKERS, see that title.

BUILDING LAWS.

A city, which has accepted the provisions of R. L. c. 104, § 1, and by that section is authorized for the prevention of fire and preservation of life to regulate by ordinance "the inspection, materials, construction, alteration and use of buildings and other structures within its limits," has no power to prohibit by ordinance the erection of any building for mercantile purposes without a license from the board of aldermen. *Goldstein* v. *Conner*, 57.

A provision in a building ordinance of a city, which is void because it exceeds the power of the city as above stated, but which is separable from other parts of the ordinance dealing generally with the subject of building regulation and inspection, does not render invalid a provision in the ordinance for the issuing by the building inspector of permits for the erection of buildings in accordance with plans and specifications which comply with the requirements of the ordinances of the city. *Ibid.*

CAPITAL AND INCOME.

See that subtitle under TRUST.

CARRIER.

Duty of a street railway company as to protection of its passengers from injuries resulting from harmful misconduct on the part of other passengers. *Coy* v. *Boston Elevated Railway*, 307.

One, who is waiting in the south terminal station in Boston outside a fence separating the tracks and the platforms between them from the rest of the station, and who has purchased a ticket and intends to board a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, is not a passenger of such railroad company. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

Other actions by passengers against street railway, elevated and railroad corporations for personal injuries, see the appropriate subtitles under NEGLIGENCE.

CERTIORARI.

Where in dealing with a petition to a board of county commissioners containing a single prayer asking them "to lay out a county highway over the route" of a town way and of a way called an "ancient way," the board erroneously laid out a highway over the alleged "ancient way" and relocated the town way, and the whole course of their proceedings indicated that they regarded the two ways as designed to be used together and to serve one main purpose in common, a writ of certiorari was granted quashing the entire proceedings. *Main* v. *County Commissioners*, 182.

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CHARITY.

What constitutes.

A gift by will of property, the income of which shall be used for keeping in repair a church building used as a place of public worship, is a gift for a charitable use. *Chase* v. *Dickey*, 555.

Construction of a will from which it appeared that the testator had no general intent to give to charitable purposes a portion of the residue which was undisposed of after a life estate given to the testator's widow. *Bragg* v. *Litchfield*, 148.

Validity of a Gift to Charitable or Benevolent Purposes.

Where a gift by will of the residue of a large estate provides that such portion of the income as should be necessary shall be used for the repair of certain buildings, and "that the balance of said income and such portion of the principal as may be deemed wise shall be devoted and used" for a general purpose alleged to be charitable, the provision for the repair of the buildings can be regarded as a charge on the fund subordinate to the main purpose of the trust, so that, if this provision should fail or be unenforceable, it would not affect the character of the true residuary provision of the will as to the "balance" of the income. *Chase* v. *Dickey*, 555.

Suit involving the question of the validity of a residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me." *Ibid.*

Taxation of Property devoted to Charitable or Benevolent Purposes.

Extent of exemption from taxation of Old South Meeting House and land adjacent thereto. *Old South Association* v. *Boston*, 299.

In determining the validity of a tax assessed by the city of Boston upon property which it had received and was holding as the residuary legatee and devisee under a will for public charitable purposes, it was stated that neither in Burr *v.* Boston, 208 Mass. 537, nor in the present case had this court considered whether real estate situated in certain towns and included in the same devise to the city was liable to taxation in those towns. *Massachusetts General Hospital* v. *Boston*, 20.

Real estate and personal property given by will to a city to constitute a fund, the income of which is to be applied to park purposes, is exempt from taxation after an order of the city council accepting the gift and so long as the city retains it under the will. *Ibid.*

CHARTER PARTY.

Effect of the fact that a ship is unchartered upon the rights of a seaman thereon to recover for his wages. *Bingham* v. *Monroe*, 455.

CHRISTIAN SCIENCE.

A residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion

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Christian Science (*continued*).

of Christian Science as taught by me" is not void by reason of indefiniteness, assuming that such teachings are not more difficult of ascertainment than those of other Christian sects. *Chase* v. *Dickey*, 555.

In a suit in equity to test the validity of such a gift, it was assumed that "the religion of Christian Science as taught" by its founder stood as a subject for charity upon the same footing as the religion of other Christian sects, but it was stated that an inquiry into the character of the teachings of the founder of Christian Science further than was possible upon the record before the court would be necessary before it could be determined whether such assumption as to the religion so taught was justified. *Ibid.*

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

COMMONWEALTH.

On a petition under R. L. c. 201 by a contractor against the Commonwealth to recover the balance due on a contract for the construction of a public building, it was held that, even if the strict doctrine of tender was applicable as against the Commonwealth, there was evidence warranting a finding that an actual tender or further steps toward it had been waived by the petitioner, and that therefore it did not appear that in disallowing interest any error of law had been made. *Burr* v. *Commonwealth*, 534.

In such case it also was held that the petitioner was entitled to no interest. *Ibid.*

CONFLICT OF LAWS.

Policy of life insurance issued by a New York insurance company which, it was held, should be construed in accordance with Massachusetts law because the contract was made in Massachusetts. *Davis* v. *New York Life Ins. Co.* 310.

Law of Turkey, annulling a marriage made there because the wife, while she and her husband were domiciled in Turkey, changed her religion from Christian to Mohammedan and married a Mohammedan, was recognized as binding in this Commonwealth. *Kapigian* v. *Minassian*, 412.

Second marriage, made by the husband after such annulment of the first marriage and after he had changed his domicil to Massachusetts, was held to be valid. *Ibid.*

An action of contract for the collection of assessments imposed by an order of a court in another State on the holders of policies in an insolvent mutual corporation organized under the laws of that State, under a provision in the policies which would not be valid in a Massachusetts policy, may be maintained by the receiver of the property of the corporation in the courts of this Commonwealth, when the contracts of insurance were made and were to be performed in such other State and there are valid. *Stone* v. *Old Colony Street Railway*, 459.

The provision of St. 1894, c. 522, § 3, now contained in St. 1907, c. 576, § 3, that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," is not to be interpreted as attempting to regulate or prohibit contracts made in other jurisdictions

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or to deprive a citizen of this Commonwealth of the right to protect himself from loss through a contract of insurance made in another State. *Stone* v. *Old Colony Street Railway*, 459.

Contract of insurance between a street railway corporation, incorporated and doing business in this Commonwealth, and an insurance company, organized and doing business in another State, which was held to have been made and to be performed in the home State of the insurance company and not to have been illegal although the insurance company had not complied with the requirements of our statutes with regard to foreign insurance companies doing business in this Commonwealth. *Ibid.*

CONSTABLE.

See OFFICER.

CONSTITUTIONAL LAW.

Right of Trial by Jury.

Right of trial by jury in equity, see *Ginn* v. *Almy*, 486.

Due Process of Law.

St. 1910, c. 567, regulating the fares to be charged for the transportation of school pupils, was held to be constitutional as a proper exercise by the Legislature of the police power, and not to deprive of a certain street railway company of its property without due process of law. *Commonwealth* v. *Boston & Northern Street Railway*, 82.

St. 1909, c. 490, Part III, § 56, imposing an excise tax on certain foreign business corporations having a usual place of business in this Commonwealth, was held not to be unconstitutional as a taking of property without due process of law. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

Equal Protection of the Laws.

St. 1909, c. 490, Part III, § 56, imposing an excise tax upon certain foreign business corporations having usual places of business in this Commonwealth, was held not to be unconstitutional as denying to any person within the jurisdiction of the Commonwealth equal protection of the laws. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

Rights of Defendant in Criminal Case.

Defendant in a criminal case should be allowed to introduce evidence to explain the true significance of flight and breach of bail by him. *Commonwealth* v. *Goldberg*, 88.

Equivocal reply of a defendant in a criminal case when a statement of an alleged accomplice, charging him with guilt, is read to him, was held to be admissible as evidence; but certain comments of the trial judge thereon were held to have been improper. *Ibid.*

Where under St. 1909, c. 504, § 103, a defendant who has pleaded not guilty to the charge of murder is committed to a State hospital for the insane for observation "until the further order of court," the court upon its own motion without a violation of the Fourteenth Amendment to the Consti-

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tution of the United States may order him returned to the jail from which he was transferred and determine for itself the question of his insanity. *Commonwealth* v. *Spencer*, 438.

Police Power.

St. 1910, c. 567, regulating the fares to be charged for the transportation of school pupils, is constitutional as a proper exercise by the Legislature of the police power. *Commonwealth* v. *Boston & Northern Street Railway*, 82.

In a suit in equity it was held, that under the circumstances it was not necessary to determine either the meaning or the constitutionality of St. 1903, c. 459, relating to permission to be given by municipalities to persons and corporations for the laying under public ways of pipes and conduits for the conveyance of water. *Willets* v. *Langhaar*, 573.

Interstate Commerce.

St. 1909, c. 490, Part III, § 56, imposing an excise tax on certain foreign business corporations having a usual place of business in this Commonwealth, was held not to be unconstitutional as an interference with interstate commerce as applied to a corporation which at its place of business in this Commonwealth sells goods at wholesale and retail, one half of such sales being made to persons residing in Massachusetts and the other half being made for delivery to purchasers residing outside of Massachusetts. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

Taxation.

By St. 1909, c. 527, § 8, a succession tax is imposed upon the equal distribution of certain property among the children of the beneficiary for life under a deed of trust, made before September 1, 1907, in accordance with a provision of the deed, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to him by the deed to fix the proportions in which such property should be distributed among his children or grandchildren. The statute as so applied is constitutional. *Burnham* v. *Treasurer & Receiver General*, 165.

Constitutionality of St. 1909, c. 490, Part III, § 43, relating to an excise tax upon domestic corporations. *Farr Alpaca Co.* v. *Commonwealth*, 156.

Constitutionality of § 56 of the same statute, relating to an excise tax upon foreign corporations carrying on business in this Commonwealth. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

Separation of Powers.

Res. 1910, c. 109, as amended by St. 1911, c. 482, relating to the appointment by the Supreme Judicial Court of commissioners to report upon "an adjustment and apportionment, if any, of the expenses of the county of Suffolk and the proportion thereof, if any, that should fairly be borne" by the municipalities of Chelsea, Revere and Winthrop, was held to be unconstitutional as an attempt to transfer to the judicial department a legislative power. *Boston* v. *Chelsea*, 127.

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Parties entitled to raise Question of Constitutionality of Statute.

Upon a bill in equity under R. L. c. 25, § 100, by taxable inhabitants of a city to restrain the alleged unlawful expenditure of money for the erection of a school building in a public park, the question, whether the constitutional rights of the owners of property on which a betterment tax was assessed for the laying out and construction of the park would be infringed by the construction of the proposed building, cannot be raised, the persons whose rights thus would be affected not being parties to the suit. *Higginson* v. *Treasurer of Boston*, 583.

CONTRACT.

Consideration.

The relinquishment of a claim for damages for the breach of a contract of sale by sample by the delivery of goods of inferior quality is a good consideration for a promise of the seller to indemnify the buyer for any loss suffered by him in selling the goods. *Borden* v. *Fine*, 425.

Consideration for the indorsement of a certain promissory note, see *Young* v. *Hayes*, 525.

Validity.

Avoidance of contracts of an infant with a stockbroker who acted as his agent under his specific orders. *Benson* v. *Tucker*, 60.

Antenuptial contract by which it was agreed that upon the death of the husband the wife should by deed release all interest in his estate excepting a claim for $1,000 and security for the payment thereof, which was held to be valid and enforceable in a suit in equity for specific performance brought after the death of the husband by the husband's heir at law. *Collins* v. *Collins*, 131.

Evidence that an inventor, at the time of making a contract in writing to enter the employ of a manufacturer and to assign to the manufacturer all inventions made by him, already had assigned an invention to the manufacturer and that this was the reason he executed the contract when told by the manufacturer's general agent to sign it, has no tendency to show that the inventor was not acting voluntarily when he made the contract. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

Contract between an inventor and a corporation engaged in the business of manufacturing and leasing machinery used in the manufacture of footwear, which was held to have been an integral part of an unlawful scheme for monopolizing commerce among the several States, and therefore not to be enforceable in equity. *Ibid.*

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

In a suit in equity against three defendants in which the plaintiff sought a

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Contract (*continued*).

rescission of certain purchases of the capital stock of certain mining corporations into which he alleged he had been induced to enter through fraud of the defendants, it was held that on the averments of the bill the plaintiff was entitled to relief. *Ginn* v. *Almy*, 486.

Such suit was held to be maintainable against one of the defendants on facts found by a master. *Ibid.*

Contract of insurance between a street railway corporation, incorporated and doing business in this Commonwealth, and an insurance company, organized and doing business in another State, which was held to have been made and to be performed in the home State of the insurance company and to be enforceable in this Commonwealth although the insurance company had not complied with the requirements of our statutes with regard to foreign insurance companies doing business here. *Stone* v. *Old Colony Street Railway*, 459.

Construction.

Greater strictness is exercised in the construction of contracts than in the construction of wills. *Davis* v. *New York Life Ins. Co.* 310.

Policy of life insurance issued by a New York company which, it was held, should be construed in accordance with Massachusetts law because the contract was made in Massachusetts. *Ibid.*

One who advanced money to a creditor of a partnership as an accommodation to the partnership and made with the creditor a contract under seal which on its face could be construed as making him jointly bound with the partnership to the creditor, was allowed in a suit in equity to show by extrinsic evidence that he was merely a surety for the partnership and that the creditor knew that fact. *Bearse* v. *Lebowich*, 344.

Construction of an agreement among four persons relating to the sale of certain shares of the capital stock of a corporation and the liability of the parties on certain notes given by them for the purchase price of the stock. *Briggs* v. *Boynton*, 5.

A contract to pay an inventor for "the full and exclusive right to" his invention, as described in specifications filed with the United States commissioner of patents, "upon the final allowance of said patent," was construed to mean that the price became due to the inventor upon the issuing of a patent covering the whole or any part of the claims, either as originally set out or, by implication, as subsequently amended. *Frey* v. *Iver Johnson Sporting Goods Co.* 213.

In a contract between a merchant and a manufacturer which covered two main subjects, one, its dominant purpose, the purchase and sale of machinery, and the other the maintenance of an American agency, a provision of the contract confining the purchases and sales to the parties was held to be subsidiary to the dominant agreement relating to purchases and sales, so that no damages could be recovered for its breach where none were recoverable for breach of the agreement to which it was subsidiary. *John Hetherington & Sons, Ltd.*, v. *William Firth Co.* 257.

In a contract between a manufacturer of automobiles and a dealer, which required the dealer to "devote his best energies to the sale of the product of the" manufacturer, "best energies" was construed to mean such efforts as in the exercise of sound judgment would be likely to produce the most profitable results to the manufacturer in view of the nature of

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the business and the extent of territory over which it was to be conducted. *Randall* v. *Peerless Motor Car Co.* 352.

In further construction of such contract it was held that the dealer was not precluded by the contract from making an agreement to act as agent for the sale in the same territory of automobiles of other manufacturers which did not compete with those described in his contract with the first manufacturer, but that he was precluded from making such an agreement as to a car which did compete. *Ibid.*

Rule to be followed in such case in determining what cars should be taken to be so competing. *Ibid.*

Action against a corporation by an assignee of a shareholder for the amount of a dividend, in which it was held that by an agreement the promoters, including the plaintiff's assignor, had appropriated the dividend in question with the rest of the corporation's net earnings to the payment of certain of their notes. *Farquhar* v. *Canada-Atlantic & Plant Steamship Co.* 278.

Implied.

In law.

Deviation from a voyage agreed upon was held to have put an end to an express contract of hiring of a seaman for a certain voyage on an unchartered ship and to have entitled him to recover wages from either the owner or the master on a *quantum meruit*. *Bingham* v. *Monroe*, 455.

Such seaman was held to have a like right of recovery where without his consent the master, for an illegal purpose of which the seaman did not know and in which he did not participate, took him on a voyage in a different direction from that agreed upon. *Ibid.*

Fraudulent overstating on an invoice of the value of certain wool being shipped by sea, which resulted in a policy of marine insurance, which was in form a valued policy, becoming an open policy, and gave to the insurance company a right to recover back from the insured so much of a payment it had made on the policy as was in excess of the value of the property destroyed. *Insurance Co. of North America* v. *Willey*, 75.

Where an action at law on a building contract was amended into a suit in equity and afterwards was amended again into an action at law on a *quantum meruit* to recover the money earned by a substantial performance of the contract, it was held that the plaintiff was entitled to interest from the date of the writ in the original action at law, the cause of action having been the same throughout, and the suing out of the writ having operated as a demand for the sum that finally was found to be due. *Cormier* v. *Brock*, 292.

A contractor, who is unable to show complete performance of a building contract, may be found to be entitled to recover on a *quantum meruit* on the finding of an auditor that the plaintiff had endeavored in good faith to perform his contract and substantially had done so, although the auditor allowed the defendant a number of deductions on account of variations and omissions and inferiority of work and material. *Ibid.*

Building Contract.

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A contractor, who is unable to show complete performance of a building contract, may be found to be entitled to recover on a *quantum meruit* on a finding of an auditor that the plaintiff had endeavored in good faith to perform his contract and substantially had done so, although the auditor allowed the defendant a number of deductions on account of variations and omissions and inferiority of work and material. *Ibid.*

Assignment.

Assignment of a contract between the assignor and a building contractor which was held to have become ineffectual because the contract had been rescinded by agreement of the parties to it. *Homer* v. *Shaw*, 113.

Repudiation.

A repudiation of a contract of agency by a principal is justified if the agent by a contract with a third person has placed himself under legal obligations inconsistent with those assumed under the pre-existing contract, even though at the time of the repudiation no actual injury has been suffered by the principal and he did not know of the existence of the contract with the third person. *Randall* v. *Peerless Motor Car Co.* 352.

Failure of a dealer in automobiles to perform certain conditions precedent of an agreement with a manufacturer of automobiles which was collateral and subsidiary to a contract which was the main contract between the parties, was held not to justify the manufacturer in repudiating the main contract. *Ibid.*

Rescission.

Avoidance of contracts of an infant with a stockbroker who acted as his agent under his specific orders. *Benson* v. *Tucker*, 60.

In an action of contract against a building contractor the plaintiff alleged that he was the assignee of a sum of money which the defendant owed a subcontractor, and it was held that there was evidence warranting a finding that the contract between the defendant and the subcontractor, of which the plaintiff claimed the benefit, had been rescinded and a new arrangement had been made, without any ostensible change in the relations of the parties, whereby the subcontractor as an employee of the defendant had completed the work which his contract had called for; so that a finding for the defendant was warranted. *Homer* v. *Shaw*, 113.

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in

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equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

In a suit in equity against three defendants in which the plaintiff sought a rescission of certain purchases of the capital stock of certain mining corporations into which he alleged he was induced to enter through fraud of the defendants, it was held that on the averments of the bill the plaintiff was entitled to relief. *Ibid.*

Such suit was held to be maintainable against one of the defendants on facts found by a master. *Ibid.*

In such suit it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not under the circumstances of controlling significance. *Ibid.*

And it also was held that, under the circumstances, the fact that the plaintiff at the time of some of the purchases was a director of the corporation, did not preclude his recovery as a matter of law. *Ibid.*

In such suit no relief was given against the corporation. *Ibid.*

Suit in equity against an individual seeking a rescission because of fraud of purchases of stock of two corporations was held not to be barred by reason of the fact that the two corporations afterwards became consolidated before the plaintiff discovered the fraud practised upon him. *Ibid.*

Performance and Breach.

A wife was ordered specifically to perform an antenuptial contract, by which it had been agreed that upon the death of the husband the wife should by deed release all interest in his estate excepting a claim for $1,000 and security for the payment thereof. *Collins* v. *Collins*, 131.

Certain circumstances which justify repudiation by the principal of a contract of agency. *Randall* v. *Peerless Motor Car Co.* 352.

Where, in an action for an alleged breach of a contract in writing which required the plaintiff to do certain things before a certain date, it appears that before that date the defendant refused further to be bound by the contract, it is immaterial on the issue of the breach of the contract whether the plaintiff would have been financially able to perform what the contract required of him on the date designated. *Ibid.*

If on a January 21 a manufacturer repudiated a contract with a dealer appointing the dealer his "exclusive agent" for the sale of his product in a certain territory for a year beginning on January 1, and at that time the dealer was in such financial condition that it would have been impossible for him to make certain payments which the contract required that he should make on February 1, the dealer cannot recover substantial damages. *Ibid.*

In determining whether in selling certain motor cars an agent was breaking a contract with a manufacturer which prohibited his selling cars which compete with those of the manufacturer, competing cars here were defined as those so similar in cost, design, size, power, carrying capacity and other characteristics as fairly to leave ordinary and reasonable customers in such doubt in making a choice between them as to permit the skill of a salesman to become a determining factor. *Ibid.*

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Contract (*continued*).

Where, by the provisions of a contract between a manufacturer of and a dealer in automobiles the dealer was appointed the "exclusive agent" for the sale of the manufacturer's automobiles in a certain territory for a year beginning on a January 1, and on January 21 the manufacturer withdrew the agent's authority, it was held that such act of the manufacturer was an instant breach of the contract, and that no further performance by the dealer could be required as a condition precedent to his right to maintain an action against the manufacturer. *Randall* v. *Peerless Motor Car Co.* 352.

Evidence which was held to be for the jury on the question, whether the manufacturer had so withdrawn the agent's authority. *Ibid.*

Recovery of damages for loss of prospective profits due to a breach of such a contract. *Ibid.*

Failure of a dealer in automobiles to perform certain conditions precedent of an agreement with a manufacturer of automobiles which was collateral and subsidiary to a contract which was the main contract between the parties, was held not to justify the manufacturer in repudiating the main contract. *Ibid.*

In a contract between a merchant and a manufacturer which covered two main subjects, one, which was its dominant purpose, the purchase and sale of machinery, and the other the maintenance of an American agency, a provision confining the purchases and sales to the parties was held to be subsidiary to the dominant agreement relating to purchases and sales, so that no damages could be recovered for its breach where none were recoverable for breach of the agreement to which it was subsidiary. *John Hetherington & Sons, Ltd.*, v. *William Firth Co.* 257.

In an action for the breach of a contract by which the defendant agreed to give to the plaintiff his personal note secured by a mortgage on certain real estate to secure a loan from the plaintiff to the defendant, it was held that the question, whether a mortgage made by a third person was accepted by the plaintiff in substitution for the mortgage and note of the defendant and thus constituted a waiver of the defendants' obligation to give his personal note, was for the jury, and that the burden of proving this as an affirmative defense was upon the defendant. *Wood* v. *Blanchard*, 53.

Where there is a contract of sale by sample of cotton sweepings to be shipped in bags, the fact that the buyer had an opportunity for inspection before the bags were shipped to the consignee and that he made an examination of certain bags and rejected such portions as he observed to be defective, does not necessarily deprive him of the right to claim damages if on delivery to the consignee the cotton sweepings are found to be of a quality inferior to the sample. *Borden* v. *Fine*, 425.

In an action for the purchase price of two of three carloads of potatoes, the first carload having been paid for, in which the purchaser contended that the action could not be maintained because of a shortage in the first carload, it was held that the action might be maintained, the contract being entire and at no time having become severed, and rescission being impossible because the defendant had resold the first carload. *Craig* v. *Lane*, 195.

A contractor, who is unable to show complete performance of a building contract, may be found to be entitled to recover on a *quantum meruit* on a

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finding of an auditor that the plaintiff had endeavored in good faith to perform his contract and substantially had done so, although the auditor allowed the defendant a number of deductions on account of variations and omissions and inferiority of work and material. *Cormier* v. *Brock*, 292.

Where an inventor sells and assigns to a purchaser "the full and exclusive right to" his invention as set out in a specification of claims filed with an application for a patent in the United States patent office, "together with all improvements which may be made thereon under the scope of said patent," he is not required to submit to the purchaser any improvement which he has thought of but has not worked out. *Frey* v. *Iver Johnson Sporting Goods Co.* 213.

CONVERSION.

Action for conversion of a diamond ring, where there was evidence that the plaintiff purchased a particular diamond from the defendant with whom he left it to be set in a ring for an entire price of which he paid a part at the time of the purchase, and it was held that the evidence warranted findings that the contract of sale never had been rescinded, that any lien that the defendant had upon the ring had been ended by a tender by the plaintiff, and that the defendant had converted the ring. *Wright* v. *Frank A. Andrews Co.* 186.

CORPORATION.

Officers and Agents.

In a suit in equity against an individual for the rescission of purchases of shares of the capital stock of a corporation because of fraud of the defendant, it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not under the circumstances of controlling significance. *Ginn* v. *Almy*, 486.

In such suit no relief was given against the corporation. *Ibid.*

It also was held that, under the circumstances, the fact that the plaintiff at the time of some of the purchases was a director of the corporation, did not preclude his recovery as a matter of law. *Ibid.*

If the directors of a corporation, acting wholly outside the legitimate business of the corporation and for their own personal ends, publish in the name of the corporation a false and malicious libel concerning a person, who brings an action for the libel against the corporation and recovers substantial damages, the corporation can recover from the directors in an action at law the amount paid by the corporation upon the judgment in such action and the expenses incurred in defending it. *Hill* v. *Murphy*, 1.

And, if those in control of the corporation refuse to enforce such liability, a minority of the stockholders can maintain a suit in equity against the directors and the corporation to compel the directors to pay the amount of such judgment and expenses into the treasury of the corporation. *Ibid.*

Such a suit was held not to be barred by a judgment for the same directors in an action against them by the same person who was the successful plaintiff in the action for libel against the corporation. *Ibid.*

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The treasurer of the corporation was held, on demurrer to the bill in such suit, not to have been a proper party defendant where the allegations of the bill failed to show participation by him in the publication of the libel, or that he had power under the corporation by-laws to institute proceedings against the directors. *Hill* v. *Murphy*, 1.

By-laws and Regulations.

Construction and effect of certain by-laws of a social club relating to resignations of members and their liability for dues and assessments. *Boston Club* v. *Potter*, 23.

By-laws of a fraternal beneficiary corporation, see FRATERNAL BENEFICIARY CORPORATION.

Stockholders' Meetings.

A foreign corporation cannot maintain a bill in equity against a Massachusetts corporation of which it is not a shareholder to enjoin it from carrying out a vote, passed at a special meeting of its members and within the scope of its chartered powers, merely because of irregularities and other defects in the meeting and the vote. *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 219.

Taxation.

Taxation of foreign corporations. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35; *Keystone Watch Case Co.* v. *Commonwealth*, 50.

The tax upon a domestic corporation provided for by St. 1909, c. 490, Part III, § 43, is an excise tax upon its franchise and not a tax upon its property. *Farr Alpaca Co.* v. *Commonwealth*, 156.

Wool, purchased in a foreign country by a Massachusetts manufacturing corporation owning only real estate, machinery and merchandise, and by it brought to this Commonwealth and entered for warehousing in a United States bonded warehouse where it remains in the original packages subject to an unpaid duty to the United States, is not property of the corporation "situated in another State or country and subject to taxation therein," the value of which, under St. 1909, c. 490, Part III, § 41, cl. 3, § 43, is to be deducted from the value of the corporate franchise, or from the value of its real estate, machinery and merchandise, in ascertaining the basis for computation of the excise provided for by the statute. *Ibid.*

Such wool is included in the description, "merchandise," used in § 41 of the statute. *Ibid.*

Dividend.

It was held that a certain extra dividend, declared by a Pennsylvania railroad corporation payable in shares of stock of a New Jersey corporation which was subsidiary to it, should be treated by trustees who were shareholders of the Pennsylvania corporation as a part of the income of their trust. *Gray* v. *Hemenway*, 239.

Change of Name.

Whether under St. 1903, c. 437, §§ 5, 40, 41, the right of a corporation to change its name is subject to the control of the courts before any action upon

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the proposed change by the commissioner of corporations, was referred to as a question which it was not necessary to consider. *Houston* v. *Magrane*, 569.

Where one who had sold and conveyed to a corporation, formed for the purpose and using his full name in its corporate name, a valuable established business and its good will and the right to use his name in connection with such business, reserving to himself the right to use his own last name as a part of any firm or corporate name, sought to enjoin the corporation from changing its name to one containing his last name compounded with another name, it was held that the right reserved to the plaintiff to use his own last name as a business name was not an exclusive right but merely one to be used in common with the corporation. *Ibid.*

Consolidation.

Suit in equity against an individual seeking a rescission because of fraud of purchases of shares of stock of two corporations was held not to be barred by reason of the fact that after the purchases and before the plaintiff discovered the fraud practised upon him the two corporations became consolidated. *Ginn* v. *Almy*, 486.

Rights of Minority Stockholders.

Suit in equity by minority stockholders of a corporation to compel directors, whose acts had made the corporation liable in an action of tort for the publication of a libel, to reimburse the corporation for loss sustained by it in payment of the judgment in and of the expenses caused by that action. *Hill* v. *Murphy*, 1.

Fraternal Beneficiary Corporation.

See that title.

Charitable.

Extent of exemption from taxation of Old South Meeting House and land adjacent thereto. *Old South Association* v. *Boston*, 299.

Social Club.

The by-laws of a social club incorporated under R. L. c. 125 constitute in effect a contract between the different members and the corporation. *Boston Club* v. *Potter*, 23.

Construction and effect of certain by-laws of a social club relating to resignation of members and their liability for dues and assessments. *Ibid.*

Where by the by-laws of a social club incorporated under R. L. c. 125 annual dues become due on December 1 and are "payable quarterly in advance," the facts, that on a May 5 the property of the club is placed in the hands of a receiver by order of the Superior Court and that the members are deprived of some of the benefits of membership, do not exempt members from liability for dues for the entire year which began on the preceding December 1. *Ibid.*

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Foreign.

Taxation of foreign corporations. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35; *Keystone Watch Case Co.* v. *Commonwealth*, 50.

Rights of National Philanthropic Corporation as to Local Organization.

A demurrer to a bill in equity by a New York corporation, organized as a national body for a philanthropic purpose which contemplated separate organizations in different localities having the same purpose and practically the same constitution and under a provision of their constitutions paying half of their membership fees to the national body, to enjoin a Massachusetts corporation, organized under R. L. c. 125 as a local organization of the national body, from carrying out a vote to withdraw from the national body, passed by its members at a special meeting, was held to have been sustained rightly. *Ibid.*

Such New York corporation, called a "council," after it has permitted a Massachusetts corporation to be organized under R. L. c. 125 and to assume as its corporate name the "Boston Section" of the council, cannot maintain a bill in equity under R. L. c. 109, § 8, to enjoin the Massachusetts corporation from continuing the use of its corporate name after it has voted to withdraw from the national body. *Ibid.*

Promoter's Agreement.

Action against a corporation by an assignee of a shareholder for the amount of a dividend, in which it was held that by an agreement the promoters, including the plaintiff's assignor, had appropriated the dividend in question with the rest of the corporation's net earnings to the payment of certain of their notes; that, although the corporation had not assented to the agreement formally, it had not prevented its being carried out by the payment of the dividend in accordance with the agreement, and that it was too late for the plaintiff's assignor or any one claiming under him to contend successfully that he was entitled to the dividend. *Farquhar* v. *Canada-Atlantic & Plant Steamship Co.* 278.

Corporate Form ineffectual to shield Fraud of Persons controlling Corporation.

In a certain suit in equity against an individual for the rescission of purchases of shares of the capital stock of a corporation because of fraud of the defendant, who controlled the corporation, it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not under circumstances of controlling significance. *Ginn* v. *Almy*, 486.

In such suit no relief was given against the corporation. *Ibid.*

COUNTY COMMISSIONERS.

Certain petition to a board of county commissioners was construed to have a single averment and a single prayer. Whether the prayer was for the relocation or the laying out of a way was not decided. *Main* v. *County Commissioners*, 182.

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County commissioners have no jurisdiction to divide a single prayer of a petition, relocating part of a way described therein under R. L. c. 48, § 12, and laying out another part under § 1. *Main* v. *County Commissioners*, 182.

Action to be taken by county commissioners under R. L. c. 48, § 1, which provides for the laying out of a new highway from town to town or from place to place within the same town, or for the alteration or discontinuance of an existing highway, is fundamentally different from that to be taken under § 12 of that chapter, which provides for the relocation of a way within a town. *Ibid.*

Where, in dealing with a petition to a board of county commissioners containing a single prayer asking them "to lay out a county highway over the route" of a town way and of a way called an "ancient way," the board erroneously laid out a highway over the alleged "ancient way" and relocated the town way, and the whole course of their proceedings indicated that they regarded the two ways as designed to be used together and to serve one main purpose in common, a writ of certiorari was granted quashing the entire proceedings. *Ibid.*

COVENANT.

Action for breach of a covenant to renew a lease. *Neal* v. *Jefferson*, 517.

CUSTOM.

No custom or usage can enlarge the authority of a town treasurer beyond the limits prescribed by statute. *Franklin Savings Bank* v. *Framingham*, 92.

At the trial of an action against a street railway company for personal injuries where it appeared that the plaintiff was thrown down by the starting of a car as he was attempting to leave it, that neither the conductor nor the motorman was informed or knew of the plaintiff's intention, that the conductor in the performance of his duties was absent from the car changing a signal, and that the car had stopped at a turnout near a town line which was a fare limit where passengers got on and off cars but where there was no white post or anything else to indicate a regular stopping place, evidence tending to show that at that point conductors were in the habit of calling out and announcing the limit of the car fare properly was excluded as immaterial, there being no evidence that such an announcement was made on the occasion in question. *Coneton* v. *Old Colony Street Railway*, 28.

CY PRES.

Provisions in the residuary clause of a will which were held not to show any general charitable intent. *Bragg* v. *Litchfield*, 148.

DAMAGES.

For Property taken or injured under Statutory Authority.

Upon a petition by the Old South Association in Boston for damages sustained by the taking of land adjacent to the Old South Meeting House for the purpose of the construction of the Washington Street tunnel, it was proper for the presiding judge to rule that "the petitioner had a right under its

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charter to use the land adjacent to the meeting house in the most profitable manner whenever it saw fit to do so for the purpose of producing income to preserve the meeting house and to carry out its other charter purposes and that the jury should assess damages accordingly." *Old South Association* v. *Boston*, 299.

At the trial upon the same petition it was proper for the judge to rule that "in addition to the damages which would be awarded to an ordinary petitioner this petitioner is entitled to such a sum as will in the opinion of the jury compensate it for that feature or special damage contained in its loss by the taking which is created by the charter exemption from taxation of the space taken." *Ibid.*

The admission, at the trial of a petition for the assessment by a jury of damages for land taken by the Commonwealth by right of eminent domain, of evidence of sales of similar lots of land on the opposite side of the street, and the exclusion of evidence of a sale of adjoining land, were held not to have been shown to have been improper exercises of discretion by the trial judge. *Fourth National Bank* v. *Commonwealth*, 66.

In Contract.

In an action for a breach of contract loss of prospective profits may be recovered when such loss appears to have been within the contemplation of the parties to the contract as a probable result of a breach, to have been its natural, primary and probable consequence, and to be susceptible of proof by evidence reasonably certain and not resting chiefly on speculation, conjecture or surmise. *Randall* v. *Peerless Motor Car Co.* 352.

It is not necessary, in order that such damages may be recovered, that they should be capable of calculation with mathematical accuracy. *Ibid.*

Evidence which was held to warrant findings justifying the allowance of damages for such loss of prospective profits from a breach of a contract appointing the plaintiff the defendant's "exclusive agent" for the sale of the defendant's goods. *Ibid.*

Prospective profits were allowed as an element of damage in an action against a lessor for breach of a covenant to renew a lease. *Neal* v. *Jefferson*, 517.

In recommitting an auditor's report in an action of contract, it is proper for the court, with regard to a request of the moving party that the auditor be given instructions as to what rule of damages he should follow, to rule that "the time has not come for the court to lay down the rule of law as to the damages which the plaintiff is entitled to recover, if he is entitled to recover." *Randall* v. *Peerless Motor Car Co.* 352.

In a contract between a merchant and a manufacturer which covered two main subjects, one, which was its dominant purpose, the purchase and sale of machinery, and the other the maintenance of an American agency, a provision confining the purchases and sales to the parties was held to be subsidiary to the dominant agreement relating to the purchases and sales, so that no damages could be recovered for its breach where none were recoverable for breach of the agreement to which it was subsidiary. *John Hetherington & Sons, Ltd.*, v. *William Firth Co.* 257.

Evidence, upon which it was held that it properly might be found, in regard to a transaction involving an agreement for the purchase of a trustee's receipt representing shares of stock in a corporation, that the parties in-

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tended the title to the property to pass to the buyer, subject to a lien of the seller for an unpaid balance of the purchase money, and that, upon the failure of the buyer to pay such balance, the seller could recover it in an action of contract. *Bellows* v. *McKenzie*, 601.

In Tort.

Evidence upon which it was held in an action by a married woman against a corporation operating an elevated railway for personal injuries sustained from the plaintiff's hand being caught by a sliding door of a car of the defendant, that the jury had a right to find that tuberculosis was a direct and immediate result of the plaintiff's injuries and to assess damages therefor. *Larson* v. *Boston Elevated Railway*, 262.

In an action for the amount paid by the plaintiff for medical attendance upon his wife in consequence of injuries sustained by her by reason of the negligence of the defendant, it is right for the presiding judge to refuse to give instructions based on the assumption that the plaintiff can recover for the expenses only of such services as were necessary, because it may have been wise and proper at the time to incur expense for services which afterwards are shown to have been unnecessary. *Hunt* v. *Boston Terminal Co.* 99.

In such an action the plaintiff under the circumstances was allowed to recover a fair amount paid for the physician's services, although the wife's physical condition was not what the physician had supposed it was and would not have been supposed to be so by a physician more skilful, experienced and highly trained, and even although the injuries might have been aggravated by the treatment given. *Ibid.*

New trial of an action for personal injuries, in which the defendant did not admit that the plaintiff had suffered damage and where at the former trial the judge erroneously admitted certain evidence on the question of damages, was not confined to the subject of damages. *Allen* v. *Boston Elevated Railway*, 191.

In Writ of Entry.

The provisions of R. L. c. 179, §§ 12, 13, 21, to the effect that when the demandant in a writ of entry recovers judgment he shall recover damages for rents and profits and any damages for waste to be determined by the jury at the same time unless a postponement of the assessment of such damages is allowed upon a motion made before the verdict on the title is recorded, still apply so far as possible to writs of entry since their transfer to the Land Court by St. 1904, c. 448, although there is no jury in that court, the rule being that such damages must be assessed at the time of the trial of the title unless a motion for the postponement is made before the finding of the Land Court is filed. *Langley* v. *Conlan*, 135.

Interest.

Upon a petition of interpleader filed under R. L. c. 173, § 37, by the defendant in an action at law, or by the respondent in a petition in the nature of an action at law, the defendant or respondent by admitting his liability for

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the amount claimed subject to the claims of other persons named as claimants, without making a payment into court, does not make himself liable for the payment of interest for which he otherwise would not be liable. *Burr* v. *Commonwealth*, 534.

On the facts appearing at the hearing of a petition by the trustee in bankruptcy of a contractor under R. L. c. 201 to recover a balance due to the bankrupt under a contract made with officers or agents of the Commonwealth for the construction of a public building, it was held that the petitioner was entitled to no interest. *Ibid.*

In the same case it was held that, even if the strict doctrine of tender was applicable as against the Commonwealth, there was evidence warranting a finding that an actual tender or further steps toward it had been waived by the petitioner, and that therefore it did not appear that in disallowing interest any error of law had been made. *Ibid.*

Nominal.

If on a January 21 a manufacturer repudiated a contract with a dealer appointing the dealer his "exclusive agent" for the sale of his product in a certain territory for a year beginning on January 1, and at that time the dealer was in such financial condition that it would have been impossible for him to make certain payments which the contract required that he should make on February 1, the dealer cannot recover substantial damages. *Randall* v. *Peerless Motor Car Co.* 352.

In an action of contract where an auditor's report has been admitted in evidence without objection, in which the auditor upon questions of fact finds for the plaintiff for substantial damages, it cannot be ruled as a matter of law that the plaintiff is entitled only to nominal damages. *Ibid.*

Mitigation.

In an action by a dealer in automobiles against a manufacturer for damages resulting from a repudiation of a contract of employment of the plaintiff as an exclusive agent, it was held that a contention by the defendant, that as matter of law profits made by the plaintiff from the sale of a certain other car should be considered in mitigation of damages, could not be sustained. *Randall* v. *Peerless Motor Car Co.* 352.

In an action against a lessor for breach of a covenant to renew a lease it was held that the lessor was not entitled to any reduction of damages because the lessee had refused to accept a certain offer of a new lease at a higher rate, made to him by one to whom the lessor had conveyed the premises. *Neal* v. *Jefferson*, 517.

Recoupment.

In an action of contract by the receiver of the property of an insolvent mutual insurance corporation organized in another State, to collect an assessment decreed to be due by the order of a court of that State assessing the policy holders under the terms of contracts of insurance made in that State and there valid, such decree having been held to be enforceable in the courts of this Commonwealth, the defendant can have no right of set-off or recoup-

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ment for the amount of his accrued claims under his policies, because this would give him a preference over other creditors and policy holders of the insolvent insurance company. *Stone* v. *Old Colony Street Railway*, 459.

DEATH.

A municipal corporation cannot be held liable for a loss of life occurring in the operation of a gas or electric lighting plant operated by it. *O'Donnell* v. *North Attleborough*, 243.

Actions for death caused by negligence, see NEGLIGENCE, *Causing Death.*

DECEIT.

Fraudulent overstating on an invoice of the value of certain wool being shipped by sea, which resulted in a policy of marine insurance, which was in form a valued policy, becoming an open policy, and gave to the insurance company a right to recover back from the insured so much of a payment it had made on the policy as was in excess of the value of the property destroyed. *Insurance Company of North America* v. *Willey*, 75.

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

DEED.

Construction.

A certain deed, which conveyed to the grantee and his heirs and assigns the right to the use of the water from certain springs in connection with his house and tannery, was held to have created an easement appurtenant to the grantee's house and tannery land, and not an easement in gross. *Willets* v. *Langhaar*, 573.

Validity.

On an appeal from a decree for the plaintiff in a suit in equity brought in the name of an aged woman by the conservator of her estate to set aside a deed of real estate and a bill of sale of personal property executed by the plaintiff to one of her two daughters and alleged to have been procured by the undue influence of such daughter, the decree was affirmed, it being held that the finding of the trial judge on conflicting evidence could not be said to have been plainly wrong. *Campbell* v. *Lima*, 11.

DERIVING SUPPORT FROM PROSTITUTION.

An indictment found on August 6, 1910, under St. 1910, c. 424, § 5, charging that the defendant during the three months next preceding the finding of

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the indictment, knowing a certain woman to be a prostitute, did derive support and maintenance in part from the earnings and proceeds of her prostitution, is sufficient, although that statute did not go into effect until after the beginning of the three months named in the indictment and the acts charged to have been committed by the defendant were not indictable during the first part of the period described. *Commonwealth* v. *Peretz*, 253.

DEVISE AND LEGACY.

General Rule of Construction.

Greater strictness is exercised in the construction of contracts than in the construction of wills. *Davis* v. *New York Life Ins. Co.* 310.

Validity.

The provision of R. L. c. 37, § 9, by which a church is prohibited, when objection is made by the Commonwealth, from receiving a gift of property which produces an income of more than $2,000 a year, although it prevents a church from taking such property devised to it as trustee, does not affect the validity of such devise, which must be determined independently of the statute. *Chase* v. *Dickey*, 555.

Such section prohibits a corporation under R. L. c. 37, § 1, consisting of the officers of an unincorporated church performing duties similar to those of deacons or wardens, when objection is made by the Commonwealth, from receiving a gift of property to be held by it in trust and not for its own special uses, which produces an income of more than $2,000 a year. *Ibid.*

The validity of such a gift can be brought in question only by the Commonwealth; but this may be done by the Attorney General on becoming a party to a suit which was not instituted by him. *Ibid.*

Where a gift by will of the residue of a large estate provides that such portion of the income as shall be necessary shall be used for the repair of certain buildings, and "that the balance of said income and such portion of the principal as may be deemed wise shall be devoted and used" for a general purpose alleged to be charitable, the provision for the repair of the buildings can be regarded as a charge on the fund subordinate to the main purpose of the trust, so that, if this provision should fail or be unenforceable, it would not affect the character of the true residuary provision of the will as to the "balance" of the income. *Ibid.*

A residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me" is not void by reason of indefiniteness, assuming that such teachings are not more difficult of ascertainment than those of other Christian sects. *Ibid.*

In a suit in equity to test the validity of such a gift it was assumed that "the religion of Christian Science as taught" by its founder stood as a subject of charity upon the same footing as the religion of other Christian sects, but it was stated that an inquiry into the character of the teachings of the founder of Christian Science further than was possible on the record before the court would be necessary before it could be determined whether such assumption as to the religion so taught was justified. *Ibid.*

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Rights of Adopted Child.

Under a will which contains certain bequests to a son of the testator and makes no mention of a child or issue of the son, an adopted child of the son takes nothing if the son dies before the testator. *Gammons* v. *Gammons*, 454.

Children taking per Stirpes.

In construing a will which provided that the residue of the estate of the testator should be placed in trust during the lives of the testator's five children, three daughters and two sons, naming them, the income to be paid to them, "meaning and intending hereby that my estate shall be held in trust for the benefit of my children, during their several lives and upon the decease of any one of them, having children of his or her body such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body then such share to be added to the share of my surviving children or to whom his or her share shall have passed or who have become entitled thereto," it was held that children of the sons and daughters of the testator who had died leaving issue were entitled to share in the estate *per stirpes*. *Boston Safe Deposit & Trust Co.* v. *Nevin*, 232.

Residuary Clause.

Where in a clause of his will a testator directed that his personal effects should be distributed according to a letter, which he had not written at the time when he executed his will, it was held that they were to be distributed in accordance with the residuary clause of the will. *Bushby* v. *Newhall*, 432.

Vested Remainder.

By the provisions of a will, the residue of the estate of the testator was placed in trust for the children of the testator for their lives "and upon the decease of any one of them, having children of his or her body such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body then such share to be added to the share of my surviving children or to whom his or her share shall have passed or who have become entitled thereto. The property is to be kept for my children and the children of their respective bodies and for no one else." It was held that a remainder vested at the death of the testator in certain grandchildren of the testator who were living at the time of his death, so that the estate which thus vested in one of the grandchildren passed on her death to the administrator of her estate so far as it was personal property, and so far as it was real estate passed to her heirs. *Boston Safe Deposit & Trust Co.* v. *Nevin*, 232.

When Title to Real Estate passes.

Where by the residuary clause of a will real estate and personal property are given to a city to constitute a fund, the income of which is to be applied to the maintenance and improvement of a common and parks, and the city by an order of its council accepts the gift and appoints the city treasurer to receive the property, the title of the real estate passes to the city without any formal tender or conveyance to the treasurer or the city. *Massachusetts General Hospital* v. *Boston*, 20.

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For Charitable Purposes.

See CHARITY.

Cy Pres.

Construction of a will upon which it was held that it did not appear that the testator had any general intent to give to charitable purposes all of the residue of his estate not given to his widow. *Bragg* v. *Litchfield*, 148.

Intestacy.

Where the residuary clause of a will gave the widow a life estate in the residue and disposed by specific devises and legacies of certain portions of the estate after her death, it was held that, as to so much of the estate as was not so specifically mentioned, there was an intestacy, and that the widow could not share therein as a statutory heir, since it was clear that the testator intended the provision he had made for her to be full and final. *Bragg* v. *Litchfield*, 148.

Change of Class by Codicil.

Codicil which was held to show a manifest intent of the testator to exclude one, who by the will had been made a member of a class to benefit by a certain bequest, from sharing in the bequest as changed in the codicil. *Willis* v. *Richardson*, 31.

Trust.

As to trusts created by wills, see TRUST.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICIL.

A person whose domicil at a certain time is in issue may testify as to his intention at that time. *Kapigian* v. *Minassian*, 412.

Law of Turkey, annulling a marriage made there because the wife, when she and her husband were domiciled in Turkey, changed her religion from Christian to Mohammedan and married a Mohammedan, was recognized as binding in this Commonwealth. *Ibid.*

Second marriage made by the husband after such annulment of the first marriage and after he had changed his domicil to Massachusetts, was held to be valid. *Ibid.*

In an action by the tax collector of a town for the amount of a tax on personal property, where the defendant contended that she had changed her domicil to another town, the evidence was held to warrant a finding that there had been no such change of domicil. *Babcock* v. *Slater*, 434.

In such an action, a decision of the board of appeal under St. 1909, c. 490, Part III, § 68, affirming, on an appeal by the town of which the plaintiff is tax collector, a decision of the tax commissioner under St. 1906, c. 463, Part II, § 217, determining that the proportion of the franchise tax corresponding to certain shares of a Massachusetts railroad corporation, which were owned by the defendant at the time of the assessment of the tax

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which was the basis of the action, was due to the other town, is not an adjudication, binding on the plaintiff in favor of the defendant, to the effect that the defendant's domicil was in such other town. *Babcock* v. *Slater*, 434.

EASEMENT.

Mere non-user does not conclusively impair or defeat an easement created by a deed which contains no provision that it should do so. *Willets* v. *Langhaar*, 573.

In a suit in equity to enjoin an alleged infringement by the defendant of a right, created by a deed, to use the waters of a certain spring, the question, whether the easement had been abandoned, was held to be a question of fact, findings of a master upon which could not be said to be plainly wrong. *Willets* v. *Langhaar*, 573.

A certain deed, which conveyed to the grantee and his heirs and assigns the right to the use of the water from certain springs in connection with his house and tannery, was held to have created an easement appurtenant to the grantee's house and tannery land, and not an easement in gross. *Ibid.*

St. 1906, c. 463, Part II, § 80, prohibiting the acquisition of a prescriptive right in the land of a railroad corporation by an owner or occupier of adjoining land, has no application where the owner in fee of land, subject to an easement of a railroad corporation, has continuously and openly used and occupied the land as his own to the exclusion of the railroad corporation and with its knowledge and acquiescence, and contends that the railroad corporation has abandoned its easement. *Amee* v. *Boston & Albany Railroad*, 421.

Certain evidence which was held to be admissible to prove such abandonment. *Ibid.*

ELECTION.

A seaman who was hired by the master of an unchartered vessel may maintain an action for his wages against either the owner or the master; but he cannot maintain an action against both of them, because the liability of the owner is based upon an implied authority of the master to contract on his behalf, and the bringing of an action against the master is an election to treat him and not the owner as the principal. *Bingham* v. *Monroe*, 455.

ELECTRIC LIGHTING.

A municipal corporation cannot be held liable for a loss of life occurring in the operation by it of a gas and electric lighting plant. *O'Donnell* v. *North Attleborough*, 243.

ELEVATED RAILWAY.

Actions against elevated railway corporations for personal injuries, see NEGLIGENCE, *Elevated Railway.*

ELEVATOR.

Employee who was assisting the engineer of a building to repair an elevator was held to have assumed the risk of injury due to a defect in the machinery controlling the elevator. *Archer* v. *Eldredge*, 400.

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EMINENT DOMAIN.

Rules of law applicable to the assessment of damages for the taking of certain property by right of eminent domain. *Old South Association* v. *Boston*, 299.

Rule as to the admissibility of evidence of the value of land near or adjacent to land taken by right of eminent domain. *Fourth National Bank* v. *Commonwealth*, 66.

EMPLOYER'S LIABILITY.

See NEGLIGENCE, *Employer's Liability.*

EQUITABLE LIEN.

An equitable lien on personal property, as between the parties to it, may be established by showing an arrangement between the parties which in the light of the circumstances indicates a contemporaneous intention to adjust their rights upon the basis of such a lien, without proof of an express agreement that there should be such a lien. *Westall* v. *Wood*, 540.

Enforcement of equitable lien in equity, see EQUITY JURISDICTION, *To enforce Equitable Lien.*

EQUITY JURISDICTION.

Equity regards Substance and not Form.

In a suit in equity against an individual for the rescission of purchases of shares of the capital stock of a corporation because of fraud of the defendant, who was in control of the corporation, it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not under the circumstances of controlling significance. *Ginn* v. *Almy*, 486.

In such suit no relief was given against the corporation. *Ibid.*

Suit in equity against an individual seeking a rescission because of fraud of purchases of stock of two corporations was held not to be barred by reason of the fact that the two corporations afterwards became consolidated before the plaintiff discovered the fraud practised upon him. *Ibid.*

Laches or Acquiescence.

In a suit in equity for an accounting, if it appears that during certain years the plaintiff received from the defendant payments in settlement of the account for those years and that the payments were smaller than they should have been, but that he was induced to accept such settlements through fraud of the defendant, the account ordinarily will be reopened and the plaintiff will be given relief. *Fordyce* v. *Dillaway*, 404.

If, however, in such suit it appears that in the last two of such years the plaintiff accepted the decreased sums without protest when he could have asserted his rights, and that he assented to such reduced payments, not because he was misled but for unrevealed reasons, such delay or forbearance on his part will prevent the reopening of the account. *Ibid.*

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Res judicata.

A suit in equity by a minority of the stockholders of a corporation to compel the directors to reimburse the corporation for amounts paid by it in satisfaction of a judgment in and for expenses of defending an action at law against it for libel published by the directors in the name of the corporation, is not barred by a judgment in favor of the defendant directors in an action by the same plaintiff against them for the same libel. *Hill* v. *Murphy*, 1.

Judgment entered by agreement, discharging a trustee in an action brought by trustee process in which an adverse claimant had set up a claim that the debt of the trustee to the defendant had been assigned to him, was held not to be *res judicata* barring a suit in equity by the same plaintiff against the same defendant, the trustee, the claimant and others, in which it was alleged that the conveyance set up by the claimant in the action at law was made fraudulently in the course of a conspiracy on the part of all the defendants excepting the trustee to defeat, delay and defraud creditors of the principal defendant. *Hutchins* v. *Nickerson*, 118.

Negligence barring Suit.

Fact, that the plaintiff in a suit in equity, seeking a rescission of purchases of "treasury stock" of a corporation on the ground of fraud, was a director of the corporation when he made the purchases, was held not to bar the suit as a matter of law under the circumstances. *Ginn* v. *Almy*, 486.

Specific Performance.

Antenuptial contract by which it was agreed that upon the death of the husband the wife should by deed release all interest in his estate excepting a claim for $1,000 and security for the payment thereof, which was held to be valid and enforceable after the death of the husband in a suit in equity for specific performance brought by the husband's heir at law. *Collins* v. *Collins*, 131.

Suit in equity by a corporation, engaged in the business of manufacturing and leasing patented machinery used in the manufacture of footwear throughout the United States, against an inventor, to enforce the specific performance of a provision in a contract in writing to assign to the plaintiff all patents obtained by the defendant upon inventions made by him while in the employ of the plaintiff and for ten years thereafter, in which it was held that the contract would not be enforced because it was an integral part of an unlawful scheme for monopolizing commerce among the several States. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

Certain evidence, offered in such suit, tending to show that the inventions assigned to the plaintiff by the defendant during the term of his employment were worth as much as he had received in weekly wages under the contract, was held to have been excluded properly as immaterial. *Ibid.*

For an Accounting.

Suit in equity for an accounting against an attorney at law who committed a breach of trust and a fraud upon the plaintiff by receiving personally certain property in return for the surrender of a claim of the plaintiff against a third person which the plaintiff had entrusted to him for collection. *Kelly* v. *Allin*, 327.

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In such suit it was held that, if the defendant wished to show that a part of the consideration for his receipt of the property was the surrender of another claim, the burden was upon him to show what that part was, and that in the absence of evidence upon the subject it would be assumed that the whole of the consideration for the property was the surrender of the claim of the plaintiff. *Kelly* v. *Allin*, 327.

In such suit it also was held that it was immaterial whether the plaintiff's claim in the action which the defendant had caused to be disposed of for his own benefit was well founded. *Kelly* v. *Allin*, 327.

And it further was held that the plaintiff had the right to elect whether she would bring a suit to compel a conveyance to her of the property which the defendant had acquired by his breach of trust, or the present suit to hold the defendant accountable for the gain which he had made. *Ibid.*

Suit in equity against an individual and a corporation for an accounting and specific performance of an oral agreement, where it appeared that the plaintiff, the individual defendant and a third person, having been ousted from control of the defendant corporation, had formed a competing corporation; that, to induce them to make an agreement to cease competition, the defendant corporation conveyed to the individual defendant certain securities and agreed with him in writing to pay to him a certain sum yearly for a number of years as a salary; that he orally had agreed with the plaintiff and their associate to divide such securities and salary with them and had not carried out his agreement. *Fordyce* v. *Dillaway*, 404.

In such a suit, if it appears that during certain years the plaintiff received from the defendant payments in settlement of the account for those years and that the payments were smaller than they should have been, but that he was induced to accept such settlements through fraud of the defendant, the account ordinarily will be reopened and the plaintiff will be given relief. *Ibid.*

If, however, it appears that in the last two of such years the plaintiff accepted the decreased sums without protest when he could have asserted his rights, and that he assented to such reduced payments, not because he was misled but for unrevealed reasons, such delay or forbearance on his part will prevent the reopening of the account. *Ibid.*

Where in a suit in equity the plaintiff seeks to have the defendant compelled to make periodical payments to him under an oral agreement as to a trust and a decree is entered adjudging that such agreement be enforced, there cannot be included in a final decree an order that the defendant also shall pay sums which have fallen due under the agreement during the pendency of the suit. *Ibid.*

To recover such sums the plaintiff must resort to a supplemental bill or to an amendment in the nature of a supplemental bill alleging that such additional sums have fallen due since the suit was begun. *Ibid.*

To relieve from Results of Fraud.

Suit in equity by a woman against a promoter of mining schemes to compel the defendant to reassign to the plaintiff a mortgage which he was alleged to have induced the plaintiff by fraud to assign to him, in which it appeared that the defendant had transferred the mortgage by a further assignment to a trust company to secure a loan to him of $3,000, and that later he took

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up the loan from the trust company by borrowing $3,500 from one S. on an assignment of the mortgage, and it was held that the evidence warranted a finding that the defendant obtained the assignment from the plaintiff by deception and fraud and that the plaintiff was entitled to a decree requiring the defendant to pay his note for $3,500 to S. and to reassign the mortgage to the plaintiff upon the surrender of the mining stock by the plaintiff to the defendant. *Burleson* v. *Woodin*, 323.

Suit in equity against an attorney at law to compel him to account for certain property fraudulently received and retained by him. *Kelly* v. *Allin*, 327.

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

In such a suit, even if the plaintiff also seeks under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of his claim equitable assets of the defendants in the hands of another, the granting of a trial by jury is discretionary with the court. *Ibid.*

In a suit in equity against an individual for the rescission of purchases of shares of the capital stock of a corporation because of fraud of the defendant, who controlled the corporation, it was held that the facts, that some of the purchases were of "treasury stock" of the corporation and were delivered to the plaintiff by the corporation's treasurer so that the defendant was not technically the vendor, were not under the circumstances of controlling significance. *Ibid.*

In such suit no relief was given against the corporation. *Ibid.*

It also was held that, under the circumstances, the fact that the plaintiff at the time of some of the purchases was a director of the corporation, did not preclude his recovery as a matter of law. *Ibid.*

Suit in equity against an individual seeking because of fraud a rescission of purchases of shares of stock of two corporations was held not to be barred by reason of the fact that after the purchases and before the plaintiff discovered the fraud practised upon him the two corporations became consolidated. *Ibid.*

In a suit in equity against the president of a mining corporation to recover amounts of money paid by the plaintiff in certain transactions in shares of the capital stock of the corporation, if it appears that the plaintiff, after he had purchased some shares from the defendant because of false representations made to him by the defendant, also purchased shares from other persons by reason of the same false representations of the defendant, and it does not appear that the defendant in any way profited by the purchases from such other persons, the plaintiff cannot recover the amounts paid in such later purchases. *Ibid.*

To set aside Deed procured by Undue Influence.

On an appeal from a decree for the plaintiff in a suit in equity brought in the name of an aged woman by the conservator of her estate to set aside a deed

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of real estate and a bill of sale of personal property executed by the plaintiff to one of her two daughters and alleged to have been procured by the undue influence of such daughter, the decree was affirmed, it being held that the finding of the trial judge on conflicting evidence could not be said to have been plainly wrong. *Campbell* v. *Lima*, 11.

To enforce Trust.

Trust, created when the holder of a certificate of fraternal insurance made it payable to a cousin who agreed in writing that upon the death of the insured he would collect the proceeds of the certificate and hold them for the benefit of a friend who had made certain cash advances for the insured and to whom the insured delivered the certificate, was held to be valid and enforceable by a suit in equity. *Kerr* v. *Crane*, 224.

Suit in equity against an individual and a corporation for an accounting and specific performance of an oral agreement, where it appeared that the plaintiff, the individual defendant and a third person, having been ousted from control of the defendant corporation, had formed a competing corporation; that, to induce them to make an agreement to cease competition, the defendant corporation conveyed to the individual defendant certain securities and agreed with him in writing to pay to him a certain sum yearly for a number of years as a salary; that he orally had agreed with the plaintiff and his associate to divide such securities and salary with them and had not carried out his agreement. *Fordyce* v. *Dillaway*, 404.

Suit by Minority Stockholders against Directors of Corporation.

Suit in equity by minority stockholders of a corporation, those in control of the corporation having refused to act in its behalf, to compel directors, whose acts had made the corporation liable in an action of tort for the publication of a libel, to reimburse the corporation for loss sustained by it in payment of the judgment in and of the expenses caused by such action. *Hill* v. *Murphy*, 1.

To enforce Rights of Surety.

Where a third person, solely as an accommodation to a partnership, gave to a creditor of the partnership additional security for the payment of the partnership debt, the creditor understanding the real relation of the parties, and made with him a contract under seal which on its face could be construed as making such third person and the partnership jointly bound to the creditor as principals, it was held that by a suit in equity he might compel the creditor first to apply toward satisfaction of the debt the securities furnished by the partnership before resorting to those furnished by the plaintiff as an accommodation to them. *Bearse* v. *Lebowich*, 344.

To enforce Equitable Lien.

Where one, to whom a purchaser of land had mortgaged it to secure a loan of money to be advanced from time to time for the purchase price of the land and the erection of a building thereon, accepted an order for the price of lumber to be used in the construction of the building, it was held that the circumstances clearly showed an intention of the parties that the lumber

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paid for by the plaintiff should become subject to the lien of the mortgage, and that equity would enforce such lien. *Westall* v. *Wood*, 540.

In such a suit one to whom the mortgagee has assigned the mortgage to hold it exclusively for his benefit is a necessary party. *Ibid.*

To establish Rights of Pew Holder.

In a suit in equity by the owner of sixty-five out of one hundred and seventy-five pews in a church building belonging to a religious society, to set aside a conveyance by the society to an incorporated church, it was held that the conveyance was a proper one under R. L. c. 36, § 54, and that the only relief to which the plaintiff was entitled was a decree establishing his property rights as a pew owner in the church building transferred to the incorporated church. *Massachusetts Baptist Missionary Society* v. *Bowdoin Square Baptist Society*, 198.

Marshalling.

Where a third person, solely as an accommodation to a partnership, gave to a creditor of the partnership additional security for the payment of the partnership debt, the creditor understanding the real relation of the parties, and made with him a contract under seal which on its face could be construed as making such third person and the partnership jointly bound to the creditor as principals, it was held that by a suit in equity he might compel the creditor first to apply toward satisfaction of the debt the securities furnished by the partnership before resorting to those furnished by the plaintiff as an accommodation to them. *Bearse* v. *Lebowich*, 344.

To reach and apply Equitable Assets.

A claim for the repayment of money on the rescission of a sale is a "debt" within the meaning of that word as used in R. L. c. 159, § 3, cl. 7. *Ginn* v. *Almy*, 486.

In a suit in equity against a husband and a wife it appeared that certain sales of shares of corporation stock by the husband to the plaintiff should be rescinded and that money paid in the transactions by the plaintiff to the husband should be repaid to the plaintiff, that the proceeds of the sale had been paid to the wife and that she held other shares by transfer from her husband, and it was held that the suit could be maintained against the wife only under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of the debt due to the plaintiff from her husband the shares and the proceeds in her possession from the sale. *Ibid.*

In such suit, the granting of a trial by jury is discretionary with the court. *Ibid.*

Creditors' Bill to reach and apply Property fraudulently conveyed.

In a suit in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a judgment debt due to the plaintiff from the principal defendant property conveyed by him to and for the benefit of the other defendants fraudulently and with intent through a conspiracy on the part of all of the defendants to defeat, delay and defraud

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the creditors of the principal defendant, demurrers to the bill were held to have been overruled properly. *Hutchins* v. *Nickerson*, 118.

The bill in such a suit does not become multifarious merely because it follows all the ramifications of the conspiracy and thereby includes persons of varying degrees of culpability against whom the issues are not identical and against whom different kinds of relief may be necessary. *Ibid.*

To establish Claim barred by Special Statute of Limitations.

Facts which were held to warrant a finding that the plaintiff, in a suit in equity under R. L. c. 141, § 10, against the executrix of the will of a constable, to obtain a judgment for a claim not prosecuted within two years after the defendant had given notice of her appointment, had not been guilty of culpable neglect in not prosecuting his claim within the two year period. *Ryan* v. *Lyon*, 416.

Where, in such suit, it appeared that, before the plaintiff's cause of action accrued, the estate of the defendant's testator had been represented insolvent and that commissioners had been appointed under R. L. c. 142, it was held that under R. L. c. 142, § 30, no action could have been maintained upon the plaintiff's claim before the expiration of the two year period of limitation and that therefore the plaintiff was entitled to no judgment against the defendant. *Ibid.*

Rescission.

Suit for rescission of certain purchases of shares of stock in mining corporations into which the plaintiff was induced to enter by fraud. *Ginn* v. *Almy*, 486.

To enjoin Use of Name.

Where one who had sold and conveyed to a corporation, formed for the purpose and using his full name in its corporate name, a valuable established business and its good will and the right to use his name in connection with such business, reserving to himself the right to use his own last name as a part of any firm or corporate name, sought to enjoin the corporation from changing its name to one containing his last name compounded with another name, and it was held that the right reserved to the plaintiff to use his own last name as a business name was not an exclusive right but one to be used in common with the corporation. *Houston* v. *Magrane*, 569.

In a suit in equity to restrain the defendant from using the trade name, "Flexible Arch," on an appeal from a decree dismissing the bill after exceptions to a master's report had been overruled, the evidence on which the master's findings were based not being before this court, the decree was affirmed, it being manifest that the decree lawfully was entered upon the facts found and stated in the report of the master and the memorandum of the trial judge. *E. W. Burt & Co.* v. *Coes & Young Co.* 134.

To enjoin Irreparable Injury to Real Estate.

St. 1904, c. 448, which transferred from the Superior Court to the Land Court jurisdiction in the proceedings relating to real estate there enumer-

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ated of which the Superior Court formerly had exclusive jurisdiction, did not take away from the Superior Court its jurisdiction, concurrent with that of the Supreme Judicial Court, over suits in equity to enjoin irreparable injury to real estate in which the title to the real estate is put in issue. *Enfield* v. *Woods*, 547.

Suit in equity by a town to enjoin the defendant from removing a monument from a lot of land used by the town as a common, in which the defendant's case was that her husband had acquired title to the land by adverse possession, and in which, on an appeal by the defendant, a decree for the plaintiff was affirmed. *Ibid.*

To enjoin Nuisance.

On an appeal from a decree for the plaintiff in a suit in equity to enjoin a nuisance from blasting done by the defendant in the construction of a tunnel for use in connection with water works, and to recover damages for injuries to the plaintiff's house and interference with his enjoyment of it, the evidence being reported, findings of a master were held not to have been plainly wrong. *Stewart* v. *Hanreddy*, 340.

To enjoin Interference with Easement.

In a suit in equity to enjoin an alleged infringement by the defendant of a right, created by a deed, to use the waters of a certain spring, the question, whether the easement had been abandoned, was held to be a question of fact, findings of a master upon which could not be said to be plainly wrong. *Willets* v. *Langhaar*, 573.

To enjoin Action on Note.

Suit in equity against two persons to enjoin the prosecution of an action at law on a promissory note payable to one of the defendants and signed only by the plaintiff but intended to have been signed by the second defendant and another person, and to determine the rights of the parties under an agreement concerning certain shares of stock involved in the same transaction as the note. *Briggs* v. *Boynton*, 5.

To enjoin Local Philanthropic Corporation from withdrawing from National Body.

A demurrer to a bill in equity by a New York corporation, organized as a national body for a philanthropic purpose which contemplated separate organizations in different localities having the same purpose and practically the same constitution and under a provision of their constitutions paying half of their membership fees to the national body, to enjoin a Massachusetts corporation, organized under R. L. c. 125 as one of such local organizations, from carrying out a vote passed by its members at a special meeting to withdraw from the national body, was held rightly to have been sustained. *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 219.

Such a New York corporation, called a council, which has permitted a Massachusetts corporation to organize under R. L. c. 125 and to assume as

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its corporate name the "Boston Section" of the council, cannot maintain a bill in equity under R. L. c. 109, § 8, to enjoin the Massachusetts corporation from continuing the use of its corporate name after it has voted to withdraw from the national body. *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 219.

To restrain Unlawful Expenditure by Municipality.

Upon a bill in equity under R. L. c. 25, § 100, by taxable inhabitants of a city to restrain the alleged unlawful expenditure of money for the erection of a school building in a public park, the question, whether the constitutional rights of the owners of property on which a betterment tax was assessed for the laying out and construction of the park would be infringed by the construction of the proposed building, cannot be raised, the persons whose rights thus would be affected not being parties to the suit. *Higginson* v. *Treasurer of Boston*, 583.

Mandatory Injunction.

In a suit in equity in which it appeared that the defendant had infringed a right of the plaintiff to use to the exclusion of the defendant the water of a certain spring and, with permission of the town, had laid a pipe in part in land of the plaintiff under a highway in the town, it was held that a mandatory injunction should issue directing the defendant to remove the pipe laid in the plaintiff's land. *Willets* v. *Langhaar*, 573.

It also was held that it was not necessary to determine in that suit either the meaning or the constitutionality of St. 1903, c. 459, relating to permission to be given by municipalities to persons and corporations for the laying under public ways of pipes and conduits for the conveyance of water. *Ibid.*

EQUITY PLEADING AND PRACTICE.

Parties.

The treasurer of a certain corporation was held not to have been a proper party to a certain suit in equity by minority stockholders of a corporation to compel directors to reimburse the corporation for loss sustained by it in payment of the judgment in and of the expenses caused by an action of tort against it for the publication of a libel by the directors in its name. *Hill* v. *Murphy*, 1.

A bill in equity cannot be maintained against a Massachusetts corporation by one who is not a shareholder therein to enjoin it from carrying out a vote, passed at a special meeting of its members and within the scope of its chartered powers, merely because of irregularities and other defects in the meeting and the vote. *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 219.

In a suit in equity to establish and enforce an equitable lien upon certain building materials as part of the security of a mortgage of real estate, where it appears that the plaintiff has caused an assignment of the mortgage to be made to a person in his employ who holds it exclusively for the plaintiff's

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benefit, such assignee is a necessary party to the suit and a decree granting relief will not be made until he has been joined as a party. *Westall* v. *Wood*, 540.

In a suit in equity by the officers of an unincorporated church constituting a corporation under R. L. c. 37, § 1, to compel a transfer to the plaintiffs of real estate devised to the church upon an alleged charitable trust, where the Attorney General had become a party and had set up as a bar that the plaintiffs were incapable of holding the property because the income from it exceeded $2,000 a year, it was held that under the circumstances the only heirs at law of the testatrix, in spite of certain acts on their part, should be allowed to intervene to the extent of being heard upon the validity of the trust. *Chase* v. *Dickey*, 555.

Bill.

In a suit in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a judgment debt due to the plaintiff from the principal defendant property conveyed by him to and for the benefit of the other defendants fraudulently and with an intent through a conspiracy on the part of all of the defendants to defeat, delay and defraud the creditors of the principal defendant, demurrers to the bill were held to have been overruled properly. *Hutchins* v. *Nickerson*, 118.

The bill in such a suit does not become multifarious merely because it follows all the ramifications of the conspiracy and thereby includes persons of varying degrees of culpability against whom the issues are not identical and against whom different kinds of relief may be necessary. *Ibid.*

The mere fact, that, in a bill in equity against several defendants in which the plaintiff seeks a rescission of certain transactions with the defendants which he alleges he was induced to enter into by fraud practised upon him by all of the defendants acting in concert, there are included averments as to transactions separate in point of time, as well as some demands for which, if they stood alone, only a court of law could give a remedy, with alternative prayers for relief which are inconsistent with each other, does not render the bill multifarious where it appears that, because of a connection between the various fraudulent acts owing to a mercantile association of the parties, such general right of rescission and of recovery can be enforced by the court of equity without making the defense burdensome. *Ginn* v. *Almy*, 486.

The relief to be given to the plaintiff in a final decree in a suit in equity cannot be greater or different from that warranted by the facts alleged in the bill at the time of the decree, although it appears that facts found upon a hearing of a suit are such that more extended or different relief might be given if the facts so found were alleged in the bill. *Ibid.*

Decree, ordering the marshalling by the defendant, who was a creditor of a partnership, of securities furnished to him by the partnership and of others furnished by the plaintiff who was surety for the partnership, which was held to have been a proper one to have entered, although the material allegations of the bill were contrary to the facts as found by the judge who heard the case on its merits, and there was no prayer applicable to those facts except the prayer for general relief, the relief given not being inconsistent with that asked for by the bill. *Bearse* v. *Lebowich*, 344.

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Supplemental Bill.

Where in a suit in equity the plaintiff seeks to have the defendant compelled to make periodical payments to him under an oral agreement as to a trust and further sums fall due under the agreement during the pendency of the suit, the plaintiff, in order to recover such sums, must resort to a supplemental bill or to an amendment in the nature of a supplemental bill. *Fordyce* v. *Dillaway*, 404.

Petition to intervene.

In a suit in equity by the officers of an unincorporated church, constituting a corporation under R. L. c. 37, § 1, to compel a transfer to the plaintiffs of real estate devised to the church upon an alleged charitable trust, where the Attorney General had become a party and had set up as a bar that the plaintiffs were incapable of holding the property because the income from it exceeded $2,000 a year, it was held that under the circumstances the only heirs at law of the testatrix, in spite of certain acts on their part, should be allowed to intervene to the extent of being heard upon the validity of the trust. *Chase* v. *Dickey*, 555.

Writ of Protection.

A writ of protection should not be issued at the request of the defendant in a suit in equity who is in another State, exempting him, while in attendance in this Commonwealth for the purposes of the trial of the suit, from arrest under R. L. c. 168, § 1, upon supplementary process issued under R. L. c. 167, § 80, in the suit on trial. *Ginn* v. *Almy*, 486.

Amendment.

Under R. L. c. 173, §§ 48, 52, the Superior Court may allow a suit in equity, originally brought as an action at law and changed by amendment into such suit, to be amended again into an action at law, with an appropriate change of parties, "to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought." *Cormier* v. *Brock*, 292.

Pro Confesso.

Where, upon the reservation of a suit in equity for determination by this court, it appears that, as to some defendants who had not appeared at any time in the proceedings and against whom decrees had been entered that the bill be taken *pro confesso*, the bill should be dismissed, a decree will be ordered dismissing the bill as to them without costs. *Ginn* v. *Almy*, 486.

Supplementary Process.

A writ of protection should not be issued at the request of the defendant in a suit in equity who is in another State, exempting him, while in attendance in this Commonwealth for the purposes of the trial of the suit, from arrest under R. L. c. 168, § 1, upon supplementary process issued under R. L. c. 167, § 80, in the suit on trial. *Ginn* v. *Almy*, 486.

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Trial of Issues by Jury.

In a suit in equity against two defendants in which the plaintiff, by reason of fraud alleged to have been practised upon him by one defendant, seeks a rescission of certain transactions with that defendant and a repayment of sums of money paid by him to that defendant in such transactions, and in which the plaintiff joins the other defendant in whose hands he alleges there is property of the first defendant which cannot be reached to be attached in an action at law and which, under R. L. c. 159, § 3, cl. 7, he seeks to have applied in payment of the amount alleged to be due to him from the first defendant, neither defendant has a right to a trial by jury, and a denial of motions by them for jury issues is a matter of judicial discretion. *Ginn* v. *Almy*, 486.

Master.

On an appeal from a final decree in a suit in equity the findings of a master in regard to matters of fact have the weight and effect of the verdict of a jury in an action at law and will not be set aside or reversed unless they are plainly wrong. *Stewart* v. *Hanreddy*, 340.

An exception in a suit in equity to the admission by a master of evidence for the purpose of contradicting the testimony of the excepting party, where the evidence admitted tended only to contradict his testimony upon an immaterial matter and did not prejudice him, should be overruled. *Kelly* v. *Allin*, 327.

Whether an attorney at law who was a defendant in a certain suit in equity being heard by a master was qualified to testify as an expert on the value of certain real estate, was held to be a matter to be determined by the master. *Ibid.*

In a suit in equity by a town founded on the plaintiff's title to a tract of land used by it as a common, which the plaintiff contended that it had acquired by adverse possession, a finding by a master "that the town . . . its selectmen and citizens generally have laid claim to said land as the property of the town . . . ever since a time prior to the year 1814" is a finding that the claim was asserted by corporate action, if such action was necessary. *Enfield* v. *Woods*, 547.

After a full hearing of a suit in equity before a master upon issues which, although not so stipulated in writing, are expressly understood by the parties and by the master as embodying in substance the entire controversy within the pleadings, and after the master has filed a report containing a statement of the issues that were so understood to have been open at the hearing and no objection or exception to such a statement in the report has been taken, it is too late for one of the parties, by an objection and an exception to the master's refusal to report certain facts, to raise an issue not understood to have been open at the hearing. *Ginn* v. *Almy*, 486.

Memorandum.

Statement in a memorandum of a judge who heard a suit in equity involving the question whether the relation between the plaintiff and a partnership was, as to a debt owed to the defendant, one of surety and principal, or one of joint principals, reading, "I find . . . that the relations of principal

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and surety did not exist between the plaintiff and" the partnership, was held under the circumstances not to be a finding of a fact but to be a conclusion of law. *Bearse* v. *Lebowich*, 344.

Dismissal of Bill.

Where, upon the reservation of a suit in equity for determination by this court, it appears that, as to some defendants who had not appeared at any time in the proceedings and against whom decrees had been entered that the bill be taken *pro confesso*, the bill should be dismissed, a decree will be ordered dismissing the bill as to them without costs. *Ginn* v. *Almy*, 486.

Decree.

The relief to be given to the plaintiff in a final decree in a suit in equity cannot be greater or different from that warranted by the facts alleged in the bill at the time of the decree, although it appears that facts found upon a hearing of the suit are such that more extended or different relief might be given if the facts so found were alleged in the bill. *Ginn* v. *Almy*, 486.

Decree ordering the marshalling by the defendant, who was a creditor of a partnership, of securities furnished to him by the partnership and of others furnished by the plaintiff who was surety for the partnership, which was held to have been a proper one to have entered, although material allegations of the bill were contrary to the facts as found by the judge who heard the case on its merits, other facts which were the basis of the decree were not alleged in the bill, and there was no prayer applicable to the facts except the prayer for general relief, the relief given not being inconsistent with that sought in the bill. *Bearse* v. *Lebowich*, 344.

Where, upon the reservation of a suit in equity for determination by this court, it appears that, as to some defendants who had not appeared at any time in the proceedings and against whom decrees had been entered that the bill be taken *pro confesso*, the bill should be dismissed, a decree will be ordered dismissing the bill as to them without costs. *Ginn* v. *Almy*, 486.

Where in a suit in equity the plaintiff seeks to have the defendant compelled to make periodical payments to him under an oral agreement as to a trust and a decree is entered adjudging that such agreement be enforced, there cannot be included in a final decree an order that the defendant also pay sums which have fallen due under the agreement during the pendency of the suit. *Fordyce* v. *Dillaway*, 404.

Reservation.

Where, upon the reservation of a suit in equity for determination by this court, it appears that, as to some defendants who had not appeared at any time in the proceedings and against whom decrees had been entered that the bill be taken *pro confesso*, the bill should be dismissed, a decree will be ordered dismissing the bill as to them without costs. *Ginn* v. *Almy*, 486.

Appeal.

After a full hearing of a suit in equity before a master upon issues which, although not so stipulated in writing, are expressly understood by the

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parties and by the master as embodying in substance the entire controversy within the pleadings, and after the master has filed a report containing a statement of the issues that were so understood to have been open at the hearing and no objection or exception to such a statement in the report has been taken, it is too late for one of the parties, by an objection and an exception to the master's refusal to report certain facts and an appeal from a decree based upon the report, to raise an issue not understood to have been open at the hearing. *Ginn* v. *Almy*, 486.

On an appeal from a final decree in a suit in equity the findings of a master in regard to matters of fact have the weight and effect of the verdict of a jury in an action at law and will not be set aside or reversed unless they are plainly wrong. *Stewart* v. *Hanreddy*, 340.

In a suit in equity to restrain the defendant from using the trade name, "Flexible Arch," on an appeal from a decree dismissing the bill after exceptions to a master's report had been overruled, the evidence on which the master's findings were based not being before this court, the decree was affirmed, it being manifest that the decree lawfully was entered upon the facts found and stated in the report of the master and the memorandum of the trial judge. *E. W. Burt & Co.* v. *Coes & Young Co.* 134.

In a suit in equity against several defendants under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a judgment debt due to the plaintiff from the principal defendant property conveyed by him to and for the benefit of the other defendants fraudulently and with an intent on the part of all of the defendants to defeat, delay or defraud the creditors of the principal defendant, the bill was taken *pro confesso* as to the principal defendant, but no final decree was made as to him. All of the other defendants demurred, their demurrers were sustained, and final decrees were entered dismissing the bill as to them. The plaintiff appealed. No party objected to this court treating the case as properly before them, and it was held, that under the exceptional circumstances it would be so treated. *Hutchins* v. *Nickerson*, 118.

Costs.

Suit in equity by trustees for instructions as to whether a certain extra dividend paid to them by a corporation of which they were stockholders was a part of the principal of the trust fund or should be distributed as income, in which, it being determined that the dividend should be distributed as income, it was held, that the costs of the litigation should be charged to the principal of the fund. *Gray* v. *Hemenway*, 239.

ESTOPPEL.

Town was held not to be estopped, by reason of assurances given by the town clerk to one about to purchase a note purporting to be the note of the town, from denying the legality of the note. *Franklin Savings Bank* v. *Framingham*, 92.

Where a beneficiary of a trust in real estate created by will, who also is given a power to dispose of the property by will, mortgages the property with full covenants of warranty before a trustee is appointed, he is estopped as against the mortgagee from exercising the power of disposing of the property by will as long as the mortgage is in force. *Langley* v. *Conlan*, 135.

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Estoppel (*continued*).

Heirs at law of a testatrix were held not to be estopped by certain transactions between them and the testatrix during her lifetime from intervening in a suit in equity involving the validity of a charitable trust created by her will. *Chase* v. *Dickey*, 555.

In a suit in equity for the rescission of purchases of shares of "treasury stock" in a corporation because of fraudulent misrepresentations on the part of the defendant, who was the real owner of the stock and profited by the transactions, it was held that, under the circumstances, the fact, that the plaintiff at the time of some of the purchases was a director of the corporation, did not as matter of law preclude his recovery. *Ginn* v. *Almy*, 486.

EVIDENCE.

Presumptions and Burden of Proof.

Cases involving the doctrine of *res ipsa loquitur*, see that subtitle under NEGLIGENCE.

At the trial of an indictment for murder where the defendant contends and has introduced evidence tending to show that he was insane when he committed the murder, the jury, in determining whether the Commonwealth has sustained the burden of proving beyond a reasonable doubt that at that time the defendant was sane, should consider, with all the other evidence, the presumption of fact that he was sane at the time. *Commonwealth* v. *Spencer*, 438.

The burden of proof may be sustained by the drawing of reasonable inferences from facts which appear in evidence. *Murphy* v. *Bay State Wine & Spirit Co.* 285.

In an action of contract, it was held that the question, whether the plaintiff had waived an exact performance of the contract by the defendant and had consented to a variation of its terms, was for the jury, and that the burden of proving such waiver was upon the defendant. *Wood* v. *Blanchard*, 53.

In a suit in equity for an accounting, against an attorney at law who committed a breach of trust and a fraud upon the plaintiff by receiving personally certain property in return for the surrender of a claim of the plaintiff entrusted to him for collection and the surrender of another claim in which the plaintiff had no interest, if the defendant wishes to show that a part of the consideration for his receipt of the property was the surrender of such other claim, the burden is upon him to show what that part was, and in the absence of evidence upon the subject it will be assumed that the whole of the consideration for the property was the surrender of the claim of the plaintiff. *Kelly* v. *Allin*, 327.

In an action of contract where there has been admitted in evidence without objection an auditor's report in which the auditor upon questions of fact finds for the plaintiff for substantial damages, it cannot be ruled as a matter of law that the plaintiff is entitled only to nominal damages. *Randall* v. *Peerless Motor Car Co.* 352.

Where, at the trial of an action for personal injuries, the plaintiff testifies through an interpreter and his testimony is confused and sometimes scarcely intelligible and the jury might find him to be an ignorant and unintelligent man, if some parts of his testimony, taken in connection with other evidence,

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tend to show that he was in the exercise of due care when injured and that his injuries were due to negligence of the defendant, the case should be submitted to the jury. *Mercier* v. *Boott Mills*, 15.

Admissions and Confessions.

At the trial of an indictment for murder where the defense was insanity, certain remarks of the defendant after his arrest which were held to be admissible as having a bearing on the question of the defendant's sanity and also as being in the nature of a confession. *Commonwealth* v. *Spencer*, 438.

At the trial of an indictment, where the Commonwealth has introduced evidence of the flight and avoidance of the defendant in another State in proceedings for his extradition after he had been arrested and held on bail upon the charge in the indictment, the defendant may introduce evidence to explain his avoidance for the purpose of showing that it was due to a cause other than a consciousness of guilt. *Commonwealth* v. *Goldberg*, 88.

At the trial of an indictment it may be shown that a statement of a person concerned with the defendant in the commission of the crime, which tended to show the defendant's guilt, was read to the defendant when he was under arrest upon the indictment and that he replied in substance that he had nothing to say at that time, and such equivocal reply of the defendant may be found by the jury to have been in substance an admission that he could not deny the statement; but it is error for the presiding judge to leave it to the jury to say whether the defendant should have made a statement and whether his failure to do so aided them in coming to a conclusion as to his guilt or innocence. *Ibid.*

At the trial of an action by an inventor against a purchaser of his invention for breach of a contract whereby the purchaser agreed to pay to the inventor a certain sum of money upon the issuance of a patent upon claims which at the time of the contract the inventor had filed with the United States commissioner of patents, or upon claims subsequently filed by way of amendment, if it appears that a patent finally was issued upon an amended claim which, while narrower than the claim originally filed, covered all of that claim which was patentable, and if there is no contention that the narrowing of the claim was due to fraud on the part of any one, evidence of admissions by the inventor that the patent which was issued did not include the important elements of his invention is immaterial. *Frey* v. *Iver Johnson Sporting Goods Co.* 213.

Absence of Witness.

Unexplained absence of the wife of the defendant in an indictment for murder as a witness to testify in her husband's behalf as to certain facts material to his defense of which she must have had knowledge, was held to be a proper subject for comment by the Commonwealth. *Commonwealth* v. *Spencer*, 438.

Competency.

For the purpose of proving title to land by adverse possession evidence of a gift of the land by parol is competent to show the character of the possession. *Enfield* v. *Woods*, 547.

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Evidence (*continued*).

Competency of certain testimony of experts at the trial of an action by an employee against his employer for injuries caused by the breaking of a boom of a derrick. *Roberts* v. *Vroom*, 168.

Neither medical books, although of recognized authority, nor the opinions of medical experts, unless testified to by themselves as witnesses, can be received as evidence. *Allen* v. *Boston Elevated Railway*, 191.

In an action by a workman against his employer for personal injuries, where evidence of declarations of a fellow workman, since deceased, that the plaintiff was injured through his negligence had been admitted properly, evidence offered by the defendant to show that on the afternoon of the day of the plaintiff's injuries the defendant paid the fellow workman his wages, as also a declaration of such workman that he was blamed by others for having caused the injuries and had decided to leave the defendant's employ, were held to be incompetent. *Gettins* v. *Kelley*, 171.

At the trial of a petition for registration of title against a railroad corporation, upon the issue whether an easement for railroad purposes over a strip of the petitioner's land had been abandoned by the respondent or its predecessors, an employee in the city engineer's office should not be allowed to testify that the city engineer's plans showed the boundary of the railroad location as excluding the strip in question, where such plans were not offered in evidence. *Amee* v. *Boston & Albany Railroad*, 421.

Evidence that an inventor, at the time of making a contract in writing to enter the employ of a manufacturer and to assign to the manufacturer all inventions made by him, already had assigned an invention to the manufacturer and that this was the reason he executed the contract when told by the manufacturer's general manager to sign it, has no tendency to show that the inventor was not acting voluntarily when he made the contract. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

In a suit in equity by a town to enjoin the defendant from removing a monument from a lot of land used by the town as a common, the defendant's case was that her husband had acquired title to the land by adverse possession, and it was held that it was competent for the plaintiff to show, by introducing in evidence the "valuation lists" of the town by which it appeared that no tax had been assessed to any one upon the land during those years, that throughout the twenty-three years during which the defendant contended that her husband was in exclusive adverse possession of the land he never paid a tax upon it. *Enfield* v. *Woods*, 547.

Hearsay.

Certain evidence which, upon the issue whether a town had acquired title to a tract of land for use as a common by adverse possession which began by a parol gift, was held to be admissible under that exception to the rule excluding hearsay evidence which allows the admission of evidence of a general or common reputation as to a matter of public or general interest. *Enfield* v. *Woods*, 547.

Employee in the office of a city engineer was not allowed to testify as to what plans in that office showed, where the plans were not offered in evidence. *Amee* v. *Boston & Albany Railroad*, 421.

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Best and Secondary.

It is proper to admit in evidence a copy of a material letter written to a party in an action of contract, where there is evidence that the letter was mailed and that the party to whom it was addressed received and credited a check which was enclosed in the letter. *Nesson* v. *Adams*, 429.

Employee in the office of a city engineer was not allowed to testify as to what plans in that office showed, where the plans were not offered in evidence. *Amee* v. *Boston & Albany Railroad*, 421.

Remoteness.

The admission, at the trial of a petition for the assessment by a jury of damages for land taken by the Commonwealth by right of eminent domain, of evidence of sales of similar lots of land on the opposite side of a street, and the exclusion of evidence of a sale of certain adjoining land, were held not to have been improper exercises of discretion by the trial judge. *Fourth National Bank* v. *Commonwealth*, 66.

Public Records.

In a suit in equity by a town to enjoin the defendant from removing a monument from a lot of land used by the town as a common, the defendant's case was that her husband had acquired title to the land by adverse possession, and it was held that it was competent for the plaintiff to show, by introducing in evidence the "valuation lists" of the town by which it appeared that no tax had been assessed to any one upon the land during those years, that throughout the twenty-three years during which the defendant contended that her husband was in exclusive adverse possession of the land he never paid a tax upon it. *Enfield* v. *Woods*, 547.

Auditor's Report.

In an action of contract where there has been admitted in evidence without objection an auditor's report in which the auditor upon questions of fact finds for the plaintiff for substantial damages, it cannot be ruled as a matter of law that the plaintiff is entitled only to nominal damages. *Randall* v. *Peerless Motor Car Co.* 352.

Opinion: Experts.

At the trial of an indictment for murder where the defense is insanity, persons who are neither physicians nor alienists should not be permitted to testify as to how certain actions of the defendant which they had observed compared with actions of insane persons whom they had seen. *Commonwealth* v. *Spencer*, 438.

As to the admissibility as evidence of the opinion of an attending or family physician as to a person's sanity. *Ibid.*

Competency of certain testimony of experts at the trial of an action by an employee against his employer for injuries caused by the breaking of a boom of a derrick. *Roberts* v. *Vroom*, 168.

At the trial of an action of tort against a street railway company for personal

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injuries alleged to have been caused by a collision of cars, a medical expert testifying for the defendant cannot be asked in cross-examination whether he is familiar with any authorities which say that a certain disease, with which the plaintiff contends that he is suffering as a result of the accident, might come as the result of a blow, nor can he be asked questions about books written by persons other than himself. *Allen* v. *Boston Elevated Railway*, 191.

Whether an attorney at law, who was a defendant in a certain suit in equity being heard by a master, was qualified to testify as an expert on the value of certain real estate, was held to be a matter to be determined by the master. *Kelly* v. *Allin*, 327.

At the trial of an action by a dealer against a manufacturer of automobiles for breach of a contract whereby the manufacturer had appointed the dealer his "exclusive agent" for the sale of his product in a certain territory for a certain year, testimony of witnesses as to their opinion of the number of automobiles the plaintiff would have sold in that time was held to have been excluded rightly. *Randall* v. *Peerless Motor Car Co.* 352.

Of State of Mind.

Evidence that an inventor, at the time of making a contract in writing to enter the employ of a manufacturer and to assign to the manufacturer all inventions made by him, already had assigned an invention to the manufacturer and that this was the reason he executed the contract when told by the manufacturer's general manager to sign it, has no tendency to show that the inventor was not acting voluntarily when he made the contract. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

A person whose domicil at a certain time is in issue may testify as to his intention at that time. *Kapigian* v. *Minassian*, 412.

On the Question of Sanity.

As to the admissibility as evidence of the opinion of an attending or family physician as to a person's sanity. *Commonwealth* v. *Spencer*, 438.

At the trial of an indictment for murder where the defense is insanity, persons who are neither physicians nor alienists should not be permitted to testify as to how certain actions of the defendant which they had observed compared with actions of insane persons whom they had seen. *Ibid.*

At the trial of an indictment for murder where the defense is insanity a physician, whose opinion, offered by the defendant on the question of his insanity, has been excluded on the ground that he was not a person peculiarly skilled on questions of insanity or an attending or family physician of the defendant, may be asked in cross-examination whether or not in a certificate as to an examination he once had made of the defendant he had not answered in the negative the question, "Is the applicant suffering from any disease of the nervous system (chorea, epilepsy, etc.)" and to state that he had so answered and that the answer was true. *Ibid.*

Certain remarks of the defendant after his arrest which were held to be admissible at the trial of an indictment for murder where the defense was insanity, as having a bearing on the question of the defendant's sanity. *Ibid.*

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Medical Books and Opinions.

Neither medical books, although of recognized authority, nor the opinions of medical experts, unless testified to by themselves as witnesses, can be received as evidence. *Allen* v. *Boston Elevated Railway*, 191.

Relevancy and Materiality.

At the trial of an indictment for murder an eyewitness of the crime, who is testifying as to events immediately preceding it and has stated that she was at her home and was engaged with the deceased in solving a picture puzzle when the clock struck eight, may be allowed to state that when the clock struck, the deceased made a remark, if there is further evidence that at that very time the defendant was in the house and that the murder was committed very shortly thereafter. *Commonwealth* v. *Spencer*, 438.

Immateriality, in a suit against an inventor to enforce the specific performance of a provision in a contract to assign to the plaintiff all patents obtained by the defendant upon inventions made by him while in the employ of the plaintiff and for ten years thereafter, of certain evidence tending to show that the inventions assigned to the plaintiff by the defendant during the term of his employment were worth as much as he had received in weekly wages under the contract. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

Admission which was excluded properly as immaterial evidence. *Frey* v. *Iver Johnson Sporting Goods Co.* 213.

Evidence, tending to show that by the use of a sidebar on the left hand side of an open electric street car or by the construction of a fence between tracks, improper conduct of passengers in rushing from that side of the car and injuring passengers standing on the running board might have been avoided, was held to have been admissible at the trial of an action against the street railway company by a person so injured. *Coy* v. *Boston Elevated Railway*, 307.

Where, in an action for an alleged breach of a contract in writing which required the plaintiff to do certain things before a certain date, it appears that before that date the defendant refused further to be bound by the contract, it is immaterial on the issue of the breach of the contract whether the plaintiff would have been financially able to perform what the contract required of him on the date designated. *Randall* v. *Peerless Motor Car Co.* 352.

Such evidence, however, is admissible on the question, whether the plaintiff should recover more than nominal damages. *Ibid.*

At the trial of an action against a street railway company for personal injuries where it appeared that the plaintiff was thrown down by the starting of a car as he was attempting to leave it, that neither the conductor nor the motorman was informed or knew of the plaintiff's intention, that the conductor in the performance of his duties was absent from the car changing a signal, and that the car had stopped at a turnout near a town line which was a fare limit where passengers got on and off cars but where there was no white post or anything else to indicate a regular stopping place, evidence tending to show that at that point conductors were in the habit of calling out and announcing the limit of the car fare properly was excluded as immaterial, there having been no evidence that such an announcement was made on the occasion in question. *Coneton* v. *Old Colony Street Railway*, 28.

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Declarations of Deceased Persons.

Declarations made in good faith and on the personal knowledge of the declarant before the beginning of an action by him are admissible in evidence under R. L. c. 175, § 66, at a trial of the case after the death of the declarant, although before his death he had testified at a previous trial. *Randall* v. *Peerless Motor Car Co.* 352.

In an action by a workman against his employer for personal injuries, where evidence of declarations of a workman, since deceased, that the plaintiff was injured through his negligence had been admitted properly, evidence offered by the defendant to show that on the afternoon of the day of the plaintiff's injuries the defendant paid the fellow workman his wages, as also a declaration of such workman that he was blamed by others for having caused the injuries and had decided to leave the defendant's employ, were held to be incompetent. *Gettins* v. *Kelley*, 171.

Extrinsic affecting Writings.

Although one, advancing money to a creditor of a partnership as an accommodation to the partnership, made with the creditor a contract under seal which on its face could be construed as binding him jointly with the partnership to the creditor, in a suit in equity he was allowed to show by extrinsic evidence that he was merely a surety for the partnership and that the creditor knew that fact. *Bearse* v. *Lebowich*, 344.

Extrinsic affecting Construction of Statute.

Although, where language in a statute has a plain meaning, such meaning cannot be affected by the character of proceedings before the enactment of the statute, records of such proceedings may be examined to assist in construing language of doubtful import in a statute. *Old South Association* v. *Boston*, 299.

Grand Jury Minutes.

A defendant in a criminal case has no right to require the production of the minutes of the testimony taken before the grand jury who found the indictment against him, for the purpose of contradicting witnesses for the Commonwealth who testified before the grand jury. *Commonwealth* v. *Goldberg*, 88.

Reputation as to Matters of Public or General Interest.

Certain evidence which, upon the issue whether a town had acquired title to a tract of land for use as a common by adverse possession which began by a parol gift, was held to be admissible under that exception to the rule against hearsay which allows the admission of evidence of a general or common reputation as to a matter of public or general interest. *Enfield* v. *Woods*, 547.

Of Testimony of Witness deceased since Previous Trial.

Use, after the death of a party to an action, of his testimony at a previous trial. *Randall* v. *Peerless Motor Car Co.* 352.

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Of Abandonment of Easement by Railroad.

Certain evidence which was held to be admissible to show that a railroad corporation had abandoned an easement in land, see *Ames* v. *Boston & Albany Railroad*, 421.

Of Adverse Possession.

See *Enfield* v. *Woods*, 547.

Of Oral Instructions to Corporation's Employees.

In an action for personal injuries against a corporation operating an elevated railway, it was said that the question, how far evidence of oral instructions given to the guards and brakemen employed upon the defendant's elevated trains would be admissible for the purpose of showing negligence of the defendant, was an open one. *Larson* v. *Boston Elevated Railway*, 262.

Of Value.

The admission, at the trial of a petition for the assessment by a jury of damages for land taken by the Commonwealth by right of eminent domain, of evidence of sales of similar lots of land on the opposite side of a street, and the exclusion of evidence of a sale of certain adjoining land, were held not to have been improper exercises of discretion by the trial judge. *Fourth National Bank* v. *Commonwealth*, 67.

Photograph.

In an action by a dealer against a manufacturer for a breach of a contract of employment of the plaintiff as the defendant's "exclusive agent" for the sale of automobiles, it was held that an exception to the admission in evidence, at a trial of the action after the death of the plaintiff, of a photograph of the plaintiff at the time covered by the contract, must be overruled because, while the discretion of the judge would have been exercised more wisely by the exclusion of the photograph, it could not be said that his admission of it was plainly wrong. *Randall* v. *Peerless Motor Car Co.* 352.

EXECUTOR AND ADMINISTRATOR.

Who may act.

A trust company incorporated in 1890, "with all the powers and privileges and subject to all the duties, liabilities and restrictions set forth in all general laws which now are or may hereafter be in force relating to such corporations," under the express provisions of R. L. c. 116, § 18, may be appointed the executor of a will. *Old Colony Trust Co.* v. *Wallace*, 335.

Delayed Enforcement of Claim.

Facts which were held to warrant a finding that the plaintiff, in a suit in equity under R. L. c. 141, § 10, against the executrix of the will of a constable to obtain a judgment for a claim not prosecuted within two years after the defendant had given notice of her appointment, had not been guilty of culpable neglect in not prosecuting his claim within the two year period. *Ryan* v. *Lyon*, 416.

Where, in such suit, it appeared that, before the plaintiff's cause of action

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accrued, the estate of the defendant's testator had been represented insolvent and that commissioners had been appointed under R. L. c. 142, it was held that under R. L. c. 142, § 30, no action could have been maintained upon the plaintiff's claim before the expiration of the two year period of limitation and that therefore the plaintiff was entitled to no judgment against the defendant. *Ryan* v. *Lyon*, 416.

New Assets.

Where, about a year and a half after his appointment, an executor, who also was a sole devisee, brought a suit in equity in his own name as devisee against a person to whom the testator had given a deed of real estate absolute in form, alleging that the deed was in fact a mortgage and seeking to redeem the real estate, and more than two years after giving notice of his appointment he obtained a decree for redemption under which he received a deed of the real estate on paying personally the amount of the mortgage debt, such real estate became new assets of the testator's estate making the executor subject to an action at law under R. L. c. 141, § 1. *Horton* v. *Robinson*, 248.

St. 1907, c. 549, limiting the time within which real estate of a deceased person conveyed absolutely or in mortgage for value and in good faith can be taken or sold for payment of his debts, has no application to such an action. *Ibid.*

EXPLOSIVES.

In an action by an administrator against a railroad corporation for the suffering and death of a boy fifteen years of age caused by the explosion of a railroad signal torpedo which was the property of the defendant, it was held that the defendant was not bound reasonably to anticipate the carrying away of the torpedo by one of the intestate's companions, and that a subsequent explosion occurring while the boys were playing with the torpedo could not be found to have been caused by the negligence of the defendant or of its baggage master. *Jacobs* v. *New York, New Haven, & Hartford Railroad*, 96.

FIRE.

Insurance against loss by fire, see INSURANCE, *Fire.*

FRATERNAL BENEFICIARY CORPORATION.

Where a by-law of an incorporated fraternal beneficiary order, conducting its business on the lodge system, provides that a member suspended by reason of non-payment of an assessment to the collector within thirty days from notice of it shall be reinstated on payment of the assessment within the next thirty days, the collector, in the absence of any rule or by-law to the contrary, by agreement with a delinquent member may make such payment in his behalf. *Walker* v. *United Order of the Golden Star*, 289.

Such payment made in good faith within the required period, in the absence of any requirement of good health as a condition of reinstatement, will operate to reinstate the member although when it was made he was suffering from an injury which later caused his death. *Ibid.*

Although a benefit cannot be paid by a Massachusetts fraternal beneficiary

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corporation to one who does not belong to any of the classes described in R. L. c. 119, § 6, and a beneficiary properly named in a certificate cannot make a valid assignment of his expectant interest, before the death of the member to whom the certificate was issued, to one who does not belong to any of those classes, the beneficiary may bind himself by the creation of a trust to collect and pay the benefit after the member's death to a person designated by the member to whom for a valid consideration the member had delivered the certificate, although such person does not belong to any of the classes described in the statute; and after the member's death such person may enforce the trust by a suit in equity. *Kerr* v. *Crane*, 224.

FRAUD.

Suits in equity to relieve from results of fraud, see EQUITY JURISDICTION, *To relieve from Results of Fraud.*

Delay and forbearance caused by fraud of the defendant in a suit in equity were held not to be laches barring the maintenance of the suit. *Fordyce* v. *Dillaway*, 404.

Suit in equity for an accounting against an attorney at law who committed a breach of trust and a fraud upon the plaintiff by receiving and retaining personally certain property in return for the surrender of a claim of the plaintiff against a third person. *Kelly* v. *Allin*, 327.

Fraudulent overstating on an invoice of the value of certain wool being shipped by sea, which resulted in a policy of marine insurance, which was in form a valued policy, becoming an open policy, and gave to the insurance company a right to recover back from the insured so much of a payment made on the policy as was in excess of the value of the property destroyed. *Insurance Company of North America* v. *Willey*, 75.

GAS.

A municipal corporation cannot be held liable for a loss of life occurring in the operation of a gas and electric lighting plant operated by it. *O'Donnell* v. *North Attleborough*, 243.

HIGHWAY.

See WAY, *Public.*

HOMICIDE.

Commitment of one indicted for Murder to Hospital for Observation as to Insanity.

St. 1909, c. 504, § 103, regarding the commitment of a defendant in a criminal case to a hospital for the insane for observation, was held not to delegate solely to the trustees and superintendent of such hospital the determination of the question whether such defendant shall remain longer at the hospital. *Commonwealth* v. *Spencer*, 438.

Where a defendant has been so committed for observation "until the further orders of court," the court upon its own motion and without violating the Fourteenth Amendment to the Constitution of the United States may order him returned to the jail from which he was transferred and determine for itself the question of his insanity. *Ibid.*

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Informality in the order of the Superior Court in such case which was held to have been immaterial. *Commonwealth* v. *Spencer*, 438.

Insanity as a Defense.

A judge presiding at the trial of an indictment for murder where the defense was insanity, who refused to make certain specific inquiries of each proposed juror and asked each proposed juror the questions specified in R. L. c. 176, § 28, after having explained carefully to all of the panel the meaning of those questions, was held to have exercised his discretion wisely. *Commonwealth* v. *Spencer*, 438.

At the trial of an indictment for murder where the defendant contends and has introduced evidence tending to show that he was insane when he committed the murder, the jury, in determining whether the Commonwealth has sustained the burden of proving beyond a reasonable doubt that at that time the defendant was sane, should consider, with all the other evidence, the presumption of fact that he was sane at the time. *Ibid.*

Certain remarks of the defendant after his arrest which were held to be admissible at the trial of an indictment for murder, where the defense was insanity, as having a bearing on the question of the defendant's sanity and also as being in the nature of a confession. *Ibid.*

At the trial of an indictment for murder where the defense is insanity, persons who are neither physicians nor alienists should not be permitted to testify as to how certain actions of the defendant which they had observed compared with actions of insane persons whom they had seen. *Ibid.*

At the trial of an indictment for murder where the defense is insanity a physician, whose opinion, offered by the defendant on the question of his insanity, has been excluded on the ground that he was not a person peculiarly skilled on questions of insanity or an attending or family physician of the defendant, may be asked in cross-examination whether or not in a certificate as to an examination he once had made of the defendant he had not answered in the negative the question, "Is the applicant suffering from any disease of the nervous system (chorea, epilepsy, etc.)" and to state that he had so answered and that the answer was true. *Ibid.*

Evidence.

At the trial of an indictment for murder an eyewitness of the crime, who is testifying as to events immediately preceding it and has stated that she was at her home and was engaged with the deceased in solving a picture puzzle when the clock struck eight, may be allowed to state that when the clock struck the deceased made a remark, if there is further evidence that at that very time the defendant was in the house and that the murder was committed very shortly thereafter. *Commonwealth* v. *Spencer*, 438.

Certain remarks of the defendant after his arrest which were held to be admissible at the trial of an indictment for murder, where the defense was insanity, as having a bearing on the question of the defendant's sanity and also as being in the nature of a confession. *Ibid.*

As to other evidence at the trial of such indictment on the question of insanity. *Ibid.*

Effect of the failure of the wife of the defendant in an indictment for murder to testify in her husband's behalf as to certain facts material to his defense. *Ibid.*

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HUSBAND AND WIFE.

Antenuptial contract by which it was agreed that upon the death of the husband the wife should by deed release all interest in his estate excepting a claim for $1,000 and security for the payment thereof, which was held to be valid and enforceable after the death of the husband in a suit in equity for specific performance brought by the husband's heir at law. *Collins* v. *Collins*, 131.

In a suit in equity against a husband and wife, where it appeared that certain sales of shares of corporation stock by the husband to the plaintiff should be rescinded and that money paid in the transactions by the plaintiff to the husband should be repaid to the plaintiff, that the proceeds of the sale had been paid to the wife and that she held other shares by transfer from her husband, it was held that the suit could be maintained against the wife only under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of the debt due to the plaintiff from her husband the shares and the proceeds from the sale in her possession. *Ginn* v. *Almy*, 486.

Under R. L. c. 175, § 20, cl. 2, a wife cannot be compelled to testify at the trial of an indictment, complaint or other criminal proceeding against her husband, but the privilege of not testifying is hers and is to be asserted by her only, and if the defendant fails to call her to testify on a matter material to his defense of which she has knowledge, and does not explain his failure to do so, such failure is a proper subject for comment adverse to him in the closing argument for the Commonwealth. *Commonwealth* v. *Spencer*, 438.

Application of the foregoing proposition of law. *Ibid.*

As to divorce, and the validity of marriages, see MARRIAGE AND DIVORCE.

INCOME AND CAPITAL.

See TRUST, *Capital and Income.*

INFANT.

After a minor at different times has paid to a stockbroker sums of money to be used in a series of transactions in which under specific orders of the minor the stockbroker buys designated shares of corporate stock, receives certificates thereof on the minor's behalf, sells those shares and buys others, which subsequently he sells, and pays to the minor as the net result of the transactions a sum of money less than the amount paid to him by the minor, the minor may rescind all the transactions and may recover from the stockbroker the difference between the amount he paid to the stockbroker and the amount he received from him. *Benson* v. *Tucker*, 60.

INSANE PERSON.

St. 1909, c. 504, § 103, regarding the commitment of a defendant in a criminal case to a hospital for the insane for observation was held not to delegate solely to the trustees and superintendent of such hospital the determination of the question whether such a defendant shall remain longer at the hospital. *Commonwealth* v. *Spencer*, 438.

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Insane Person (*continued*).

Where a defendant has been so committed for observation "until the further orders of court," the court upon its own motion and without violating the Fourteenth Amendment to the Constitution of the United States may order him returned to the jail from which he was transferred and determine for itself the question of his insanity. *Commonwealth* v. *Spencer*, 438.

Informality in the order of the Superior Court in such case which was held to have been immaterial. *Ibid.*

Trial of one indicted for murder, where the defense relied on was insanity. *Ibid.*

INSOLVENCY.

Suit in equity under R. L. c. 141, § 10, against the executor of the will of a constable to obtain a judgment for a claim not prosecuted within the period of the special statute of limitations relating to claims against estates of deceased persons, cannot be maintained where it appears that, before the plaintiff's cause of action accrued, the estate of the defendant's testator had been represented insolvent and commissioners had been appointed under R. L. c. 142, § 30. *Ryan* v. *Lyon*, 416.

Rights of the receiver of a foreign mutual insurance company against Massachusetts holders of policies. *Stone* v. *Old Colony Street Railway*, 459.

INSURANCE.

Life.

Policy of life insurance issued by a New York insurance company, which, it was held, should be construed in accordance with Massachusetts law because the contract was made in Massachusetts. *Davis* v. *New York Life Ins. Co.* 310.

Word "children" in a certain policy of life insurance was held not to include grandchildren. *Ibid.*

Fire.

"Special agents" of certain fire insurance companies were held as matter of law under the circumstances to have no authority to waive for their respective companies the requirement of the sworn statement by the insured after the fire contained in policies in the Massachusetts standard form. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

And the insurance companies were held not to have made such waiver by proceeding with arbitration under an agreement of reference which provided that "neither this submission nor the award of said referees shall in any way affect any other question than the amount of the aforesaid loss or damage, nor waive nor impair any right of any party hereto." *Ibid.*

Nor was such requirement waived by the companies' attorney in his correspondence with the attorney for the insured. *Ibid.*

Accident.

Action upon a fraternal beneficiary certificate providing an indemnity for death of the insured where it appeared that the insured was drowned from the capsizing of a canoe in which with a companion he was paddling on Moosehead Lake in Maine, and it was held that the catastrophe was not

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one resulting from over confidence for which there were reasonable grounds or from an error of judgment in regard to a matter concerning which prudent men might differ, but that it involved a lack of ordinary care and a hazardous exposure to risk of such a nature that there could be no recovery on the certificate. *Morse* v. *Commercial Travellers' Eastern Accident Association*, 140.

Marine.

Fraudulent overstating in an invoice of the value of certain wool being shipped by sea, which resulted in a policy of marine insurance, which was in form a valued policy, becoming an open policy, and gave to the insurance company a right to recover back from the insured so much of a payment it had made on the policy as was in excess of the value of the property destroyed. *Insurance Co. of North America* v. *Willey*, 75.

Foreign Insurance Company.

The provision of St. 1894, c. 522, § 3, now contained in St. 1907, c. 576, § 3, that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," is not to be interpreted as attempting to regulate or prohibit contracts made in other jurisdictions or to deprive a citizen of this Commonwealth of the right to protect himself from loss through a contract of insurance made in another State. *Stone* v. *Old Colony Street Railway*, 459.

Contract of insurance between a street railway corporation incorporated and doing business in this Commonwealth, and an insurance company, organized and doing business in another State, which was held to have been made and to be performed in the home State of the insurance company and not to have been illegal although the insurance company had not complied with the requirements of our statutes in regard to foreign insurance companies doing business in this Commonwealth. *Ibid.*

An action of contract for the collection of assessments imposed by an order of a court of another State on the holders of policies in an insolvent mutual insurance corporation organized under the laws of that State under a provision in the policies which would not be valid in a Massachusetts policy, may be maintained by the receiver of the property of the corporation in the courts of this Commonwealth, when the contracts of insurance were made and were to be performed in such other State and there are valid. *Ibid.*

In an action of contract by the receiver of the property of an insolvent mutual insurance corporation organized in another State, to collect an assessment decreed to be due by the order of a court of that State assessing the policy holders under the terms of a contract of insurance made in that State and there valid, which is held to be enforceable in the courts of this Commonwealth, the defendant can have no right of set-off or recoupment for the amount of his accrued claims under his policies, because this would give him a preference over other creditors and policy holders of the insolvent insurance company. *Ibid.*

INTENT.

A person whose domicil at a certain time is in issue may testify as to his intention at that time. *Kapigian* v. *Minassian*, 412.

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INTEREST.

Where an action at law on a building contract was amended into a suit in equity and afterwards was again amended into an action at law on a *quantum meruit* to recover the money earned by a substantial performance of the contract, it was held that the plaintiff was entitled to interest from the date of the writ in the original action at law, the cause of action having been the same throughout, and the suing out of the writ having operated as a demand for the sum that finally was found to be due. *Cormier* v. *Brock*, 292.

Interest claimed as damages, see DAMAGES, *Interest*.

INTERPLEADER.

Upon a petition of interpleader filed under R. L. c. 173, § 37, by the defendant in an action of law, or by the respondent in a petition in the nature of an action at law, the defendant or respondent by admitting his liability for the amount claimed subject to the claims of other persons named as claimants, without making a payment into court, does not make himself liable for the payment of interest for which he otherwise would not be liable. *Burr* v. *Commonwealth*, 534.

INTERROGATORIES.

See PRACTICE, CIVIL, *Interrogatories*.

INTERSTATE COMMERCE.

Contract which was held to be unenforceable because it was in violation of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

St. 1909, c. 490, Part III, § 56, imposing an excise tax on certain foreign corporations, was held not to be an interference with interstate commerce when enforced against certain corporations. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35; *Keystone Watch Case Co.* v. *Commonwealth*, 50.

JOINT TORTFEASORS.

While a separate action may be maintained by an executor or administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, against each of several persons whose negligent acts, otherwise disconnected, concurred to cause the death of the plaintiff's decedent, a single action against several persons so negligent cannot be maintained. *Brown* v. *Thayer*, 392.

Where, at the trial of such an action in which two joint tortfeasors had been joined as defendants, the presiding judge wrongly refused to rule that the defendants were joined improperly, and there was a verdict for the plaintiff, exceptions by the defendants were sustained and it was ordered that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and that, upon such a discontinuance being granted, the new trial should be confined to the question of damages. *Ibid.*

In an action for personal injuries against the Boston Terminal Company and a railroad company operating a train on tracks in the south terminal

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station in Boston, it was held that there was evidence warranting a finding that the defendants were liable as joint tortfeasors. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

Action for personal injuries which, it was held, the evidence warranted the jury in finding were caused by the concurrent negligence of persons in control of a street car and of the driver of an express wagon. *Bryant* v. *Boston Elevated Railway*, 62.

JUDGMENT.

After final judgment in an action brought by trustee process, one claiming goods, effects or credits in the hands of a supposed trustee in the action cannot be admitted as a party in that action for the purpose of establishing his claim under R. L. c. 189, § 32. *Shawmut Commercial Paper Co.* v. *Cram*, 108.

Where, in an action of contract brought by trustee process in the Superior Court, an agreement for judgment has been made between the plaintiff and the defendant, and on the first Monday of a month, after interrogatories of the plaintiff to the only remaining trustee have been answered, a motion to charge such trustee has been allowed, the action on that day goes to final judgment under R. L. c. 177, § 1, and Rule 23 of the Superior Court. *Ibid.*

Consequently, thereafter that court has no jurisdiction to allow a motion to vacate the order charging the trustee *nunc pro tunc* as of the day it was made, nor to allow the filing of a petition under R. L. c. 189, § 32, by one asserting an adverse claim to the property in the hands or possession of the alleged trustee.. *Ibid.*

See also EQUITY JURISDICTION, *Res judicata.*

JURY AND JURORS.

A judge presiding at the trial of an indictment for murder where the defense was insanity, who refused to make certain specific inquiries of each proposed juror and asked each juror the questions specified in R. L. c. 176, § 28, after having explained carefully to all of the panel the meaning of those questions, was held to have exercised his discretion wisely. *Commonwealth* v. *Spencer*, 438.

A defendant in a criminal case has no right to require the production of the minutes of the testimony taken before the grand jury who found the indictment against him for the purpose of contradicting witnesses for the Commonwealth who testified before the grand jury. *Commonwealth* v. *Goldberg*, 88.

Statement and application of the rule of law that the conduct, motives or grounds of action of jurors in the jury room are not open to subsequent investigation by examination of the jurors, but that their testimony may be received to show that an error was made in the recording of the result of their deliberations after it was reached. *Randall* v. *Peerless Motor Car Co.* 352.

Trial by jury of issues in equity cases, see EQUITY PLEADING AND PRACTICE, *Trial by Jury.*

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LABOR.

Weaving Fines.

In St. 1911, c. 584, providing that "no employer shall impose a fine upon an employee engaged at weaving for imperfections that may arise during the process of weaving," the word "fine" must be taken to mean merely a penalty, arbitrarily inflicted by the employer upon an employee for an imperfection in weaving without regard to whether the imperfection arose from any fault of the employee, by a deduction from the amount of the wages to which the employee is entitled by his contract of employment, whether that amount has been determined by the value of his work or by a fixed rate of compensation. *Commonwealth* v. *Lancaster Mills*, 315.

Payment of different prices for different grades of work in weaving was held not to be the imposing of a fine as prohibited by St. 1911, c. 584. *Ibid.*

St. 1911, c. 584, does not repeal St. 1909, c. 514, §§ 114–116, relating to weaving fines. *Ibid.*

LACHES.

See EQUITY JURISDICTION, *Laches.*

LAND COURT.

Assessment in the Land Court of damages in a writ of entry. *Langley* v. *Conlan*, 135.

LANDLORD AND TENANT.

Covenant to renew Lease.

Action against a lessor of real estate for a breach of a covenant in the lease for a renewal on request by the lessee, in which it was held that it was no defense that before such request the lessor had sold and conveyed the leased premises to a third person with notice of all the terms of the lease, and that it was not material to determine whether the plaintiff could enforce the covenant specifically against the defendant's grantee. *Neal* v. *Jefferson*, 517.

In such an action it was held that in the assessment of damages the jury under the circumstances properly could consider evidence of prospective profits and that certain evidence was not so speculative or uncertain as to preclude the recovery of such profits. *Ibid.*

It further was held in such an action that the plaintiff was not bound to accept a certain offer of the person to whom the lessor had sold the premises for the purpose of reducing the damages which otherwise he might claim. *Ibid.*

Landlord's Liability for Injury resulting from Negligence in Management of Premises.

Although a landlord who orally has let an apartment to a tenant is not obliged to put it in tenantable condition and may repudiate before performance a promise which after the letting he has made to that effect, if he goes ahead and by his servants or agents carries out such a promise, he is liable to the tenant for damages resulting from negligence on the part of his servants or agents in so doing. *Buldra* v. *Henin*, 275.

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Action against a landlord by a tenant of an apartment fitted for the use of gas, for injuries resulting from an explosion alleged to have been caused by negligence of a plumber employed by the defendant to place caps upon open pipes in the apartment. *Buldra* v. *Henin*, 275.

Eviction.

Evidence of continued failure of the landlord of an apartment house, after notice from the tenants, to run the elevator regularly and properly and to light the common stairs and the corridor, which were rendered still more dangerous by the presence of garbage, was held, under the terms of a certain lease, to be evidence that a tenant was justified in treating the condition of the premises and the manner of their maintenance as an eviction. *Nesson* v. *Adams*, 429.

Termination of Lease and Action for Rent.

Landlord's right in an action for rent to attach his tenant's personal property on the leased premises, and then also to terminate the lease and prevent the tenant from removing personal property not exempt from the attachment, see *Chetteville* v. *Grant*, 17.

LAW OF THE ROAD.

Application of the law of the road in actions for personal injuries and death caused by negligence in the use of a highway by persons driving automobiles. *Brown* v. *Thayer*, 392.

LEGACY.

See DEVISE AND LEGACY.

LIBEL.

Suit in equity by minority stockholders of a corporation, those in control of the corporation having refused to act in its behalf, to compel directors, whose acts had made the corporation liable in an action of tort for the publication of a libel, to reimburse the corporation for loss sustained by it in payment of the judgment in and of the expenses caused by such action. *Hill* v. *Murphy*, 1.

LIEN.

EQUITABLE LIEN, see that title.

LIMITATIONS, STATUTE OF.

Suit in equity under R. L. c. 141, § 10, against the executrix of the will of a constable to obtain a judgment for a claim not prosecuted within the period of the special statute of limitations relating to claims against estates of deceased persons. *Ryan* v. *Lyon*, 416.

MARRIAGE AND DIVORCE.

Law of Turkey, annulling a marriage made there because the wife, while she and her husband were domiciled in Turkey, changed her religion from

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Christian to Mohammedan and married a Mohammedan, was recognized as binding in this Commonwealth. *Kapigian* v. *Minassian*, 412.

Second marriage, made by the husband after such annulment of the first marriage and after he had changed his domicil to Massachusetts, was held to be valid. *Ibid.*

MARRIED WOMEN.

See HUSBAND AND WIFE.

MARSHALLING.

See EQUITY JURISDICTION, *Marshalling.*

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability.*

MEMORANDUM.

See that subtitle under EQUITY PLEADING AND PRACTICE, and under PRACTICE, CIVIL.

MERGER.

If one of two heirs at law of a testator is given by the will a beneficial interest in a trust of real estate and a power to dispose of the real estate by will, and, before the appointment of a trustee, mortgages the real estate with covenants of warranty, later is appointed trustee with power to sell the real estate for his own benefit, and then acquires by deed the entire interest of the other heir at law, a merger occurs which extinguishes the trust and makes ineffectual as against the mortgage a deed by a trustee appointed to succeed such heir at law on his resigning. *Langley* v. *Conlan*, 135.

MINOR.

See INFANT.

MONOPOLY.

The making by a corporation, engaged in the business of manufacturing and leasing patented machinery used in the manufacture of footwear throughout the United States, of leases of patented machines containing conditions that the lessees shall use in the manufacture of footwear no other machines which are not manufactured by the lessor, although resulting in a monopoly, is not an infraction of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647. *United Shoe Machinery Co.* v. *La Chapelle*, 467.

Although the holder of letters patent lawfully may create an extended monopoly by imposing conditions on the use of the patent, a combination of patentees resulting in an extended monopoly is subject to the prohibitions contained in U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647. *Ibid.*

Certain corporation, formed by the combination of seven or more corporations, which was held to be an illegal combination in restraint of trade, monopolizing trade and commerce among the several States in violation of U. S. St. July 2, 1890, 26 U. S. Sts. at Large, c. 647. *Ibid.*

Certain contract between such a corporation and an inventor which was held to be unenforceable. *Ibid.*

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MORTGAGE.

Of Personal Property.

Right of one in possession of a chattel under a contract of conditional sale to mortgage his interest, and rights of mortgagee upon default by mortgagor. *Dame* v. *Hanson & Co.* 124.

Upon findings of a master, to whom was referred a suit in equity to enjoin the removal of household furniture which the plaintiff had mortgaged to secure a loan of $205 and which six months afterwards had been sold at foreclosure sale for $65, that ample notice of the sale was given, that no unfairness was used toward the mortgagor, and that he could not "find that the price at which the chattels were struck off was low in proportion to their real value," the bill was dismissed. *Lipsohn* v. *Goldstein*, 144.

Of Real Estate.

Circumstances under which one, to whom a purchaser of land had mortgaged it to secure a loan of money to be advanced from time to time for the purchase price of the land and the erection of a building thereon, accepted an order for the price of lumber to be used in the construction of the building, were held clearly to show an intention of the parties that the lumber paid for by the mortgagee should become subject to the lien of the mortgage. *Westall* v. *Wood*, 540.

In a suit to enforce such a lien one to whom the mortgagee has assigned the mortgage to hold it exclusively for his benefit is a necessary party. *Ibid.*

Facts which were held to warrant findings that a certain sale in foreclosure of a mortgage of real estate was conducted properly. *Stone* v. *Haskell*, 283.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

A city, which has accepted the provisions of R. L. c. 104, § 1, and by that section is authorized for the prevention of fire and the preservation of life to regulate by ordinance "the inspection, materials, construction, alteration and use of buildings and other structures within its limits," has no power to prohibit by ordinance the erection of any building for mercantile purposes without a license from the board of aldermen. *Goldstein* v. *Conner*, 57.

Where, in a building ordinance of a city, such a provision is void because it exceeds the power of the city, but is separable from other parts of the ordinance dealing generally with the subject of building regulation and inspection, another provision in the ordinance, for the issuing by the building inspector of permits for the erection of buildings in accordance with plans and specifications which comply with the requirements of the ordinances of the city, is not thereby rendered invalid. *Ibid.*

Officers and Agents.

No custom or usage can enlarge the authority of a town treasurer beyond the limits prescribed by statute. *Franklin Savings Bank* v. *Framingham*, 92.

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A town treasurer has no authority to bind the town by his indorsement of a note as treasurer in the name of the town. *Franklin Savings Bank* v. *Framingham*, 92.

In R. L. c. 73, § 59, relating to the indorsement of a negotiable instrument by a fiscal officer of a bank or corporation, the word "corporation" does not include a town or city. *Ibid.*

Before the enactment of St. 1910, c. 616, a town clerk had no duty whatever to perform in regard to notes of the town, and representations made by a town clerk before the passage of that statute that a certain note purporting to be the note of the town was a binding obligation, and a letter from him stating that the note was "correct in every particular," relying upon which a holder in good faith purchased the note, do not estop the town in an action brought against it by such holder from showing that the alleged note was not executed according to law because the signatures upon it of a majority of the selectmen were forged by the treasurer. *Ibid.*

Under St. 1897, c. 426, §§ 2, 4; St. 1903, c. 218, the board of street commissioners, with the approval of the mayor, alone can authorize the construction of a sewer in Boston. *Sullivan* v. *Mandell*, 174.

An assessment of betterments by the board of street commissioners of Boston for a sewer which had been constructed without their authority was held not to ratify such unauthorized construction. *Ibid.*

In a suit in equity by a town founded on an alleged title to certain land used by it as a common, which it contended that it had acquired by adverse possession, a finding by a master "that the town . . . its selectmen and citizens generally have laid claim to said land as the property of the town . . . ever since a time prior to the year 1814" is a finding that the claim was asserted by corporate action, if such action was necessary. *Enfield* v. *Woods*, 547.

Liability for Defects in Highways.

Liability of municipalities under R. L. c. 51, § 18, for defects in highways, see WAY, *Public*, Defect.

Liability for Death.

R. L. c. 34, § 28, providing that "a city or town which owns or operates a gas or electric lighting plant shall be liable for any injury or damage to persons or property caused by its maintenance or operation, in the same manner and to the same extent as a private corporation," imposes no liability for causing death. *O'Donnell* v. *North Attleborough*, 243.

St. 1897, c. 416, relating to the liability for loss of life of "a corporation operating a gas or electric light plant or system," which with St. 1898, c. 565, was codified into R. L. c. 171, § 2, did not apply to a town or city operating a gas or electric light plant. *Ibid.*

R. L. c. 171, § 2, as amended by St. 1907, c. 375, relating to the liability of "a person or corporation" for causing death "by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business," does not apply to a town or city in connection with its maintenance or operation of an electric lighting plant under the provisions of R. L. c. 34. *Ibid.*

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Pipes in Highways.

In a certain suit in equity it was held that it was not necessary to determine either the meaning or the constitutionality of St. 1903, c. 459, relating to permission to be granted by municipalities to persons and corporations for the laying under public ways of pipes and conduits for the conveyance of water. *Willets* v. *Langhaar*, 573.

Suit to restrain Unlawful Expenditures.

Upon a bill in equity under R. L. c. 25, § 100, by taxable inhabitants of a city to restrain the alleged unlawful expenditure of money for the erection of a school building in a public park, the question, whether the constitutional rights of the owners of property on which a betterment tax was assessed for the laying out and construction of the park would be infringed by the construction of the proposed building, cannot be raised, the persons whose rights would be affected not being parties to the suit. *Higginson* v. *Treasurer of Boston*, 583.

Proof of Corporate Action.

In a suit in equity by a town founded on an alleged title to certain land used by it as a common, which it contended that it had acquired by adverse possession, a finding by a master "that the town . . . its selectmen and citizens generally have laid claim to said land as the property of the town . . . ever since a time prior to the year 1814" is a finding that the claim was asserted by corporate action, if such action was necessary. *Enfield* v. *Woods*, 547.

MURDER.

See Homicide.

NAME.

Whether under St. 1903, c. 437, §§ 5, 40, 41, the right of a corporation to change its name is subject to the control of the courts before any action upon the proposed change by the commissioner of corporations, was referred to as a question which it was not necessary to consider. *Houston* v. *Magrane*, 569.

Where one, who had sold and conveyed to a corporation, formed for the purpose and using his full name in its corporate name, a valuable established business, its good will and the right to use his name in connection with such business, reserving to himself the right to use his own last name as a part of any firm or corporate name, sought to enjoin the corporation from changing its name to one containing his last name compounded with another name, it was held that the right reserved to the plaintiff to use his own last name as a business name was not an exclusive right but was merely one to be used in common with the corporation. *Ibid.*

A foreign corporation organized as a national body for a philanthropic purpose, after it has permitted a Massachusetts corporation to be organized under R. L. c. 125 as a local organization bearing the name "Boston Section," combined with the name of the national organization, cannot maintain a suit in equity to compel the Massachusetts corporation to

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abandon that name upon its withdrawing from the national organization. *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 219.

NEGLIGENCE.

Due Care of Plaintiff.

Of an employee while cleaning a spinning machine in a mill, see *Keating* v. *Hewatt*, 577.

Of one working on an abutment being built for a bridge over a railroad, see *McLellan* v. *Boston & Maine Railroad*, 153.

Of a machinist who was assisting in the hoisting of a boiler head and was injured by its falling. *Sanders* v. *New York Central & Hudson River Railroad*, 269.

Of a passenger thrown down by the starting of the car as she was in the act of alighting, see *Vine* v. *Berkshire Street Railway*, 580.

Of a woman passenger on an elevated railway train whose hand was injured by being caught in a door casing into which a door slid, when she put her hand against the door to steady herself, see *Larson* v. *Boston Elevated Railway*, 262.

Of one riding in a carriage over a grade crossing of the highway with a railroad and struck by cars which had broken from the rear end of a freight train. *Poole* v. *Boston & Maine Railroad*, 596.

Of one going with a lighted match into a room into which gas had escaped. *Buldra* v. *Henin*, 275.

Of a child crossing street railway tracks in the evening and struck by a street car upon which no gong was sounded and which carried no light. *Goldberg* v. *Boston Elevated Railway*, 13.

Woman, who, having an uninterrupted view both ways of double tracks of a street railway on a highway, after being warned passed around a car which had stopped on the nearer track and was struck by a car approaching without the ringing of a gong on the farther track, was held under the circumstances as a matter of law not to have been in the exercise of due care. *Kouyoumjian* v. *Boston Elevated Railway*, 111.

Due Care of Plaintiff's Decedent.

Of a workman, who, while relying on the skill and judgment of a superintendent in certain rock blasting operations, was killed because of negligence of such superintendent. *Marana* v. *McDonough*, 189.

Imputed.

Evidence of due care of the driver of a carriage which was struck, upon a grade crossing of a highway with a railroad, by cars which had broken from the rear end of a freight train. *Poole* v. *Boston & Maine Railroad*, 596.

Employer's Liability.

Assumption of risk by employee.

In an action by an employee against his employer under the employers' liability act, the defense that the plaintiff assumed the risk of the injury

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which he received is not open if it is not set up in the answer. *Keating* v. *Hewatt*, 577.

Negligent superintendence, for which an employer is responsible under the employers' liability act, is not a risk that is assumed by an employee. *Ibid.*

Employee was held not to have assumed the risk of injury from negligence of one acting as superintendent for his employer in certain rock blasting operations. *Marana* v. *McDonough*, 189.

Assumption of risk of injury by an employee in a building while assisting an engineer to repair a defective elevator. *Archer* v. *Eldredge*, 400.

By a machinist who was assisting in hoisting a boiler head and was injured by its falling. *Sanders* v. *New York Central & Hudson River Railroad*, 269.

Ways, works or machinery.

In an action at common law and under St. 1909, c. 514, § 127, cl. 1, by an employee of one engaged in the alteration and reconstruction of a building, to recover for injuries received by reason of the breaking of a staging which had been laid across an elevator well and upon which the plaintiff was standing while at work under the direction of a superintendent of the defendant, where there was no evidence that the staging was constructed by the defendant, that it was furnished by him for the plaintiff to use, that the material of which it was constructed was furnished by the defendant, or that the defendant had adopted it for the use of his employees or had directed the plaintiff or others of his employees to use it, it was held that a verdict rightly was ordered for the defendant. *Granara* v. *Jacobs*, 271.

A count of a declaration which alleged that an employee was injured "by reason of certain defects in the ways, works and machinery of the defendants, connected with and used in the business of the defendants, which arose from or had not been discovered or remedied owing to the negligence of the defendants or of some person or persons in the service of the defendants and entrusted by the defendants with the duty of superintending the construction of said work, and whose sole or principal duty was that of superintendence," was held to charge a defect in the ways, works or machinery of the defendants under St. 1909, c. 514, § 127, cl. 1. *Ibid.*

Superintendence.

Negligent superintendence, for which an employer is responsible under the employers' liability act, is not a risk that is assumed by an employee. *Keating* v. *Hewatt*, 577.

One who was the overseer of the mule spinning department of a mill, hired and discharged those employed there, kept an account of their time and gave directions generally as to the manner in which the work of the department should be done, may be found to have been a superintendent of the proprietor of the mill within the meaning of R. L. c. 106, § 71, cl. 2. *Ibid.*

Action for personal injuries, sustained while the plaintiff was employed in the mule spinning department of a mill of the defendant and alleged to have been caused by negligence of a superintendent of the defendant, in which it was held that there was evidence of negligence of the superintendent and of due care of the plaintiff. *Ibid.*

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Action for the death of one killed in certain rock blasting operations, where it was held that there was evidence of negligence of one who could have been found to have been a superintendent of the defendant, that the risk of such negligence was not assumed by the decedent, and that it could not be said as matter of law that he was not exercising due care in relying on the skill and judgment of his superior whose orders he was bound to obey. *Marana* v. *McDonough*, 189.

Action by a machinist against a railroad corporation for personal injuries sustained when in the employ of the defendant from an iron boiler head falling upon the plaintiff while it was being hoisted under the direction of a superintendent of the defendant by an improper method. *Sanders* v. *New York Central & Hudson River Railway*, 269.

Defective or dangerous machinery or appliances.

In an action by a workman against his employer for personal injuries caused by the breaking of the boom of a derrick which fell upon the plaintiff, where there is evidence warranting a finding that the boom was defective because its inside was permeated with dry rot, the plaintiff also may introduce the testimony of an expert to the effect that the boom gave way by reason of a "crimp," described as a diseased condition which cuts the fibre of the wood, and that the "crimp" could have been ascertained by sounding with a hammer, the plaintiff not being restricted to evidence showing a single defect in the boom. *Roberts* v. *Vroom*, 168.

In such action, it appearing that the boom was being used to lift material varying from one quarter of a ton to two tons in weight, an expert was allowed to give his opinion as to the sufficiency of such a boom for general work of that character. *Ibid.*

In an action at common law and under St. 1909, c. 514, § 127, cl. 1, by an employee of one engaged in the alteration and reconstruction of a building, to recover for injuries received by reason of the breaking of a staging which had been laid across an elevator well and upon which the plaintiff was standing while at work under the direction of a superintendent of the defendant, where there was no evidence that the staging was constructed by the defendant, that it was furnished by him for the plaintiff to use, that the material of which it was constructed was furnished by the defendant, or that the defendant had adopted it for the use of his employees or had directed the plaintiff or others of his employees to use it, it was held that a verdict rightly was ordered for the defendant. *Granara* v. *Jacobs*, 271.

Action by an employee against his employer for personal injuries received by reason of the unexpected starting of a hydraulic elevator, while the plaintiff was assisting the engineer in repairing it, in which it was held that the plaintiff assumed the risk of the injury that he received and therefore that he could not maintain the action. *Archer* v. *Eldredge*, 400.

Fellow servant.

In an action by a workman against his employer for personal injuries, where evidence of declarations of a fellow workman, since deceased, that the plaintiff was injured through his negligence, had been admitted properly, evidence offered by the defendant to show that on the afternoon of the day of the plaintiff's injuries the defendant paid the fellow workman his wages, as also a declaration of such workman that he was blamed by others for

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having caused the injuries and had decided to leave the defendant's employ, were held to be incompetent. *Gettins* v. *Kelley*, 171.

Street Railway.

Traveller on highway.

In an action against a street railway company by a child who, when crossing street railway tracks on a city street under an elevated railway structure in the dusk of an April evening, was struck by a car upon which no warning gong was sounded and which carried no light, it was held that the question of the plaintiff's due care was for the jury. *Goldberg* v. *Boston Elevated Railway*, 13.

Action for personal injuries against a street railway company and an express company where there was evidence tending to show that the plaintiff was thrown down by a wagon of the express company which had been pushed from its course by a car of the street railway company, and it was held that there was evidence upon which the jury might have found that the plaintiff's injuries were caused by concurrent negligence of both defendants. *Bryant* v. *Boston Elevated Railway*, 62.

Woman, who, having an uninterrupted view both ways of double tracks of a street railway on a highway, after being warned passed around a car which had stopped on the nearer track and was struck by a car approaching on the farther track without the ringing of a gong, was held under the circumstances as a matter of law not to have been in the exercise of due care. *Kouyoumjian* v. *Boston Elevated Railway*, 111.

Evidence, in an action by one who, while riding a bicycle in the night-time, became so blinded by a headlight on a street car that he was unable to guide his bicycle and ran into a team and was injured, was held not to have been sufficient to show that the injury was caused by negligence in the use of the light. *Spoatea* v. *Berkshire Street Railway*, 599.

Passengers.

In an action for personal injuries against a street railway company by a passenger who was knocked from the left hand running board of an open car by another passenger who was rushing to leave the car, it was held that certain evidence, tending to show that by the use of a sidebar on the left hand side of the car or by the construction of a fence between the tracks such conduct on the part of passengers might be prevented, should have been admitted, and that the case should have been submitted to the jury. *Coy* v. *Boston Elevated Railway*, 307.

Action against a street railway company to recover for personal injuries alleged to have been caused by the plaintiff being thrown down by the starting of an open electric car of the defendant as he was alighting therefrom, in which it was held that there was evidence tending to show that the plaintiff was in the exercise of due care and that the conductor was negligent. *Vine* v. *Berkshire Street Railway*, 580.

The facts, that a passenger on an open electric street car which had been stopped to enable passengers to alight, arose from his seat in the middle of the car and proceeded to the side of it in an attempt to alight, after the conductor had rung a bell as a signal for the car to start, whereupon he was thrown down by the starting of the car, were said not to be conclu-

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sive evidence of negligence on his part where it also appeared that he did not understand the meaning of the ringing of the bell. *Vine* v. *Berkshire Street Railway*, 580.

The mere fact that passengers are accustomed to alight from a street car at a point near a town line, which is a fare limit, where there is not a regular stopping place for the cars for the reception and discharge of passengers, but where there is a switch and it is the duty of the conductor to leave the car to change a signal, does not impose upon the motorman the duty, before he starts the car in the absence of the conductor, of seeing that no passenger is attempting to alight. *Coneton* v. *Old Colony Street Railway*, 28.

At the trial of an action for personal injuries against a street railway company by one who was thrown down by the starting of a car as he was attempting to alight during the absence of the conductor under such circumstances, it was held that there was no evidence of negligence on the part of either the conductor or the motorman. *Ibid.*

Evidence of a custom of conductors to call out an announcement of a fare limit was held under the circumstances properly to have been excluded. *Ibid.*

In an action against a corporation operating by electricity a surface railway and also an elevated railway, it was held that the mere fact, that a passenger in an open surface car beneath the elevated structure looked up and was struck in the eye by a spark which could have been found to have been a minute piece of hot iron that fell from a train passing on the elevated road, was not sufficient to show negligence on the part of the defendant. *Carney* v. *Boston Elevated Railway*, 179.

Elevated Railway.

The fact that a car of a train on an elevated railway as it was nearing a station gave a severe and sudden lurch, which caused a passenger who was preparing to leave the car to put his hand involuntarily upon the casing of the door for support, although it is not in itself evidence of negligence in the operation of the train, is evidence of notice to the servant of the railway company in charge of the door that passengers who had come or were coming to the door for the purpose of leaving the car might be thrown against it and involuntarily might seize any support within their reach, so as to make it the duty of such servant to refrain from opening the door until he was assured that no one would be hurt by it. *Larson* v. *Boston Elevated Railway*, 262.

In an action against the railway company by a woman so injured, if it appears that as the train was approaching a station the plaintiff left her seat and walked to the door of the car when a lurch of the car threw her against the door and that by an involuntary act she put her hand upon the casing of the door to steady herself, the question whether the plaintiff was in the exercise of due care is for the jury. *Ibid.*

Evidence upon which it was held that a jury, before whom was tried an action by a married woman against a corporation operating an elevated railway for personal injuries sustained from the plaintiff's hand being caught by a sliding door of a car of the defendant, properly might have found that tuberculosis was a direct and immediate result of the plaintiff's injuries and might assess damages therefor. *Ibid.*

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In an action for personal injuries against a corporation operating an elevated railway, where the superintendent of the elevated division of the defendant's railway was called as a witness by the plaintiff and testified, without exception, that certain oral instructions were given to the guards and brakemen employed upon the defendant's elevated trains, it was said that the question, how far such evidence would have been admissible, against exception, for the purpose of showing negligence of the defendant, was an open one. *Larson* v. *Boston Elevated Railway*, 262.

In an action against a corporation operating by electricity a surface street railway and also an elevated railway, it was held that the mere fact that a passenger in an open surface car beneath the elevated structure looked up and was struck in the eye by a spark, which could have been found to have been a minute piece of hot iron that fell from a train passing on the elevated road, was not sufficient to show negligence on the part of the defendant. *Carney* v. *Boston Elevated Railway*, 179.

Railroad.

Under St. 1896, c. 516, incorporating the Boston Terminal Company to own, operate and maintain the south terminal station in Boston, and rules adopted by that company governing the way in which trains should be operated in the station, it was held that the employees of a railroad company while they were in charge of a train of the railroad company in the station remained servants and agents of the railroad company, and that the railroad company was liable for the consequences of their negligent acts. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

In the same action it was held that there was evidence warranting a finding that negligence of both the railroad company and the terminal company caused the plaintiff's injury, and that both might be held liable therefor as joint tortfeasors. *Ibid.*

In an action against a railroad corporation by a traveller on a highway who was injured in a collision at a grade crossing between a carriage in which he was and three cars which had become detached from a freight train that had just gone over the crossing and which were proceeding without any light or warning signal and without a rear brakeman at his post of duty, the fact, in the absence of any explanation, that the train had broken apart while the track and cars were under the exclusive control of the defendant, will warrant a jury in inferring negligence on the part of the defendant. *Poole* v. *Boston & Maine Railroad*, 596.

Evidence which, it was held, warranted the finding of such fact. *Ibid.*

In an action against a railroad company for personal injuries suffered by one who, while assisting a civil engineer of the defendant in work about an abutment for a bridge across the railroad, was caused to fall by a plank on which he was standing being struck by a passing train, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury. *McLellan* v. *Boston & Maine Railroad*, 153.

In an action by an administrator against a railroad corporation for the suffering and death of a boy fifteen years of age caused by the explosion of a railroad signal torpedo which was the property of the defendant, it was held that the defendant was not bound reasonably to anticipate a carrying

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away of the torpedo by one of the intestate's companions, and that an explosion, occurring while the boys were playing with the torpedo, could not be found to have been caused by the negligence of the defendant or of its baggage master. *Jacobs* v. *New York, New Haven, & Hartford Railroad*, 96.

In Use of Highway.

In an action against a street railway company by a child who, when crossing street railway tracks on a city street under an elevated railway structure in the dusk of an April evening, was struck by a car upon which no warning gong was sounded and which carried no light, it was held that the question of the plaintiff's due care was for the jury. *Goldberg* v. *Boston Elevated Railway*, 13.

Woman, who, having an uninterrupted view both ways of double tracks of a street railway on a highway, after being warned passed around a car which had stopped on the nearer track and was struck by a car approaching on the farther track without the ringing of a gong, was held under the circumstances as a matter of law not to have been in the exercise of due care. *Kouyoumjian* v. *Boston Elevated Railway*, 111.

Evidence, in an action by one who, while riding a bicycle in the night-time, became so blinded by a headlight on a street car that he was unable to guide his bicycle and ran into a team and was injured, was held not to be sufficient to show that the injury to the rider was caused by negligence in the use of the light. *Spoatea* v. *Berkshire Street Railway*, 599.

Actions against the two owners of two automobiles for the death of one boy and for personal injuries to another alleged to have been caused by the boys being run into from behind by the automobiles, in which it was held that there was evidence of negligence of the drivers of both automobiles which concurred to cause the injury of one boy and the death of the other. *Brown* v. *Thayer*, 392.

In the same action it was held that it could not be ruled that the law of the road, R. L. c. 54, § 2, relating to a vehicle passing another vehicle from the rear, had no application to the case. *Ibid.*

Action for personal injuries against a street railway company and an express company where there was evidence tending to show that the plaintiff was thrown down by a wagon of the express company which had been pushed from its course by a car of the street railway company, and it was held that there was evidence upon which the jury might have found that the plaintiff's injuries were caused by concurrent negligence of both defendants. *Bryant* v. *Boston Elevated Railway*, 62.

In Use of Automobile.

Actions against the two owners of two automobiles for the death of one boy and for personal injuries to another alleged to have been caused by the boys being run into from behind by the automobiles, in which it was held that there was evidence of negligence of the drivers of both automobiles which concurred to cause the injury of one boy and the death of the other. *Brown* v. *Thayer*, 392.

It also was held that it could not be ruled that the law of the road, R. L. c. 54, § 2, relating to a vehicle passing another vehicle from the rear, had no application to the case. *Ibid.*

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In Use of Canoe.

In an action upon a fraternal beneficiary certificate providing an indemnity for death of the insured, in which it appeared that the insured was drowned from the capsizing of a canoe in which with a companion he was paddling on Moosehead Lake in Maine, it was held that the catastrophe was not one resulting from over confidence for which there were reasonable grounds or from an error in judgment in regard to a matter concerning which prudent men might differ, but that it involved a lack of ordinary care and a hazardous exposure to risk of such a nature that there could be no recovery on the certificate. *Morse* v. *Commercial Travellers' Eastern Accident Association*, 140.

In Use of Elevator.

Action by an employee against his employer for personal injuries received by reason of the unexpected starting of a hydraulic elevator while the plaintiff was assisting the engineer in repairing it, in which it was held that the plaintiff assumed the risk of the injury that he received and therefore could not maintain the action. *Archer* v. *Eldredge*, 400.

In Construction or Alteration of Building.

Action by an employee who was injured by the breaking of a staging while he was engaged in certain work connected with the reconstruction and alteration of a building. *Granara* v. *Jacobs*, 271.

In Use of Explosive.

In an action by an administrator against a railroad corporation for the suffering and death of a boy fifteen years of age caused by the explosion of a railroad signal torpedo which was the property of the defendant, it was held that the defendant was not bound reasonably to anticipate a carrying away of the torpedo by one of the intestate's companions, and that a subsequent explosion occurring while the boys were playing with the torpedo could not be found to have been caused by the negligence of the defendant or of its baggage master. *Jacobs* v. *New York, New Haven, & Hartford Railroad*, 96.

In Blasting of Rock.

Action for the death of one killed in certain rock blasting operations, where it was held that there was evidence of negligence of one who could have been found to have been a superintendent of the defendant, that the risk of such negligence was not assumed by the decedent, and that it could not be said as a matter of law that he was not exercising due care in relying on the skill and judgment of the superintendent. *Marana* v. *McDonough*, 189.

In Use of Gas.

Action against a landlord by a tenant of an apartment fitted for the use of gas, for injuries resulting from an explosion alleged to have been caused by the failure of a plumber employed by the defendant to place caps upon open gas pipes in the apartment. *Buldra* v. *Henin*, 275.

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Of One controlling Real Estate.

Although a landlord who orally has let an apartment to a tenant is not obliged to put it in tenantable condition and may repudiate before performance a promise which after the letting he has made to that effect, if he goes ahead and by his servants or agents carries out such a promise, he is liable for damages resulting from negligence on the part of his servants or agents in so doing. *Buldra* v. *Henin*, 275.

Action against a landlord by a tenant of an apartment fitted for the use of gas, from injuries resulting from an explosion alleged to have been caused by the failure of a plumber employed by the defendant to place caps upon open pipes in the apartment. *Ibid.*

In a Mill.

Action for personal injuries, sustained while the plaintiff was employed in the mule spinning department of a mill of the defendant and alleged to have been caused by the negligence of a superintendent of the defendant, in which it was held that there was evidence of negligence of the superintendent and of due care of the plaintiff. *Keating* v. *Hewatt*, 577.

Barring Suit in Equity.

Fact, that the plaintiff in a suit in equity seeking rescission, because of fraud, of purchases of "treasury stock" of a corporation, was a director of the corporation when he made the purchases, was held not to bar the suit as a matter of law under the circumstances. *Ginn* v. *Almy*, 486.

Causing Death.

Action for the death of one killed in certain rock blasting operations, where it was held that there was evidence of negligence of one who could have been found to have been a superintendent of the defendant, that the risk of such negligence was not assumed by the decedent, and that it could not be said as a matter of law that he was not exercising due care in relying on the skill and judgment of the superintendent. *Marana* v. *McDonough*, 189.

Action for the death of a boy alleged to have been caused by negligence on the part of the drivers of two automobiles, see *Brown* v. *Thayer*, 392.

While a separate action may be maintained by an executor or administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, against each of several persons whose negligent acts, otherwise disconnected, concurred to cause the death of the plaintiff's decedent, a single action against several persons so negligent cannot be maintained. *Ibid.*

At the trial of such an action where joint tortfeasors had been joined as defendants, the presiding judge wrongly refused to rule that the defendants were improperly joined, there was a verdict for the plaintiff, exceptions by the defendants were sustained and it was ordered that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and that, upon a discontinuance being granted, the new trial should be confined to the question of damages. *Ibid.*

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Proximate Cause.

In an action by an administrator against a railroad corporation for the suffering and death of a boy fifteen years of age caused by the explosion of a railroad signal torpedo which was the property of the defendant, it was held that the defendant was not bound reasonably to anticipate a carrying away of the torpedo by one of the intestate's companions, and that a subsequent explosion occurring while the boys were playing with the torpedo could not be found to have been caused by the negligence of the defendant or of its baggage master. *Jacobs* v. *New York, New Haven, & Hartford Railroad*, 96.

Res ipsa loquitur.

In an action against a corporation operating by electricity a surface railway and also an elevated railway, it was held that the mere fact that a passenger in an open surface car beneath the elevated structure looked up and was struck in the eye by a spark, which could have been found to have been a minute piece of hot iron that fell from a train passing on the elevated road, was not sufficient to show negligence on the part of the defendant. *Carney* v. *Boston Elevated Railway*, 179.

In an action against a railroad corporation by a traveller on a highway who was injured in a collision at a grade crossing between a carriage in which he was and three cars which had become detached from a freight train that had just gone over the crossing and which were proceeding without any light or warning signal and without a rear brakeman at his post of duty, the fact, in the absence of any explanation, that the train had broken apart while the track and cars were under the exclusive control of the defendant, will warrant a jury in inferring negligence on the part of the defendant. *Poole* v. *Boston & Maine Railroad*, 596.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

OFFICER.

Under a writ of attachment in an action of contract against the proprietor of a tailoring business conducted in two rooms, each connected with a corridor, one room being used as a workroom by the employees of the establishment and the other for dealing with customers, a constable has no right against the wishes of the defendant to place a lock upon the door leading from the corridor into the workroom and to keep the defendant and his employees from using that door. *Chetteville* v. *Grant*, 17.

Suit in equity under R. L. c. 141, § 10, against the executrix of the will of a constable. *Ryan* v. *Lyon*, 416.

OLD SOUTH ASSOCIATION IN BOSTON.

Extent of exemption from taxation of Old South Meeting House and land adjacent thereto. *Old South Association* v. *Boston*, 299.

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Old South Association in Boston (*continued*).
Damages to which the Old South Association in Boston was entitled for the taking of land adjacent to the Old South Meeting House for the purpose of the construction of the Washington Street tunnel. *Old South Association* v. *Boston*, 299.

PARKS AND PARKWAYS.

The park called the Back Bay Fens, which was acquired in fee by the city of Boston for the use of the public under the authority given by St. 1875, c. 185, is held by that city as an agency of government and not as a private corporation, and the Legislature has the power to appropriate it or any part of it to another public use without the consent of the city. *Higginson* v. *Treasurer of Boston*, 583.
St. 1911, c. 540, which authorizes the park commissioners of Boston, upon the request of the school house commissioners with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens, does not authorize permission to erect in that park a building to be used not only for the High School of Commerce but also for the administrative offices of the school committee and of the school house commissioners as contemplated by St. 1909, c. 446. *Ibid.*

PASSENGER.

Duty of a street railway company as to protection of its passengers from injuries resulting from harmful misconduct on the part of other passengers. *Coy* v. *Boston Elevated Railway*, 307.
One, who is waiting in the south terminal station in Boston outside a fence separating the tracks and the platforms between them from the rest of the station, and who has purchased a ticket and intends to board a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, is not a passenger of such railroad company. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.
Other actions by passengers against street railway, elevated railway and railroad corporations, see NEGLIGENCE, *Street Railway*, *Elevated Railway*, *Railroad*.

PATENT.

A contract, to pay to an inventor for "the full and exclusive right to" his invention as described in specifications he had filed with the United States commissioner of patents, "upon the final allowance of said patent" was construed to mean that the price became due to the inventor upon the issuing of a patent covering the whole or any part of the claims, either as originally set out or, by implication, as subsequently amended. *Frey* v. *Iver Johnson Sporting Goods Co.* 213.
Where an inventor sells and assigns to a purchaser "the full and exclusive right to" his invention as set out in a specification of claims filed with an application for a patent in the United States patent office, "together with all improvements which may be made thereon under the scope of said patent," he is not required to submit to the purchaser any improvement which he has thought of but has not worked out. *Ibid.*

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PHOTOGRAPH.

Use of a photograph as evidence, see *Randall* v. *Peerless Motor Car Co.* 352.

PLEADING, CIVIL.

Declaration.

A count of a declaration, which alleged that an employee was injured "by reason of a certain defect in the condition of the ways, works and machinery of the defendants, connected with and used in the business of the defendants, which arose from or had not been discovered or remedied owing to the negligence of the defendants or of some person or persons in the service of the defendants and entrusted by the defendants with the duty of superintending the construction of said work, and whose sole or principal duty was that of superintendence," was held to charge a defect in the ways, works or machinery of the defendants under St. 1909, c. 514, § 127, cl. 1. *Granara* v. *Jacobs*, 271.

Answer.

In an action by an employee against his employer under the employers' liability act, the defense that the plaintiff assumed the risk of the injury which he received is not open if it is not set up in the answer. *Keating* v. *Hewatt*, 577.

PLEADING, CRIMINAL.

Indictment.

An indictment found on August 6, 1910, under St. 1910, c. 424, § 5, charging that the defendant during the three months next preceding the finding of the indictment, knowing a certain woman to be a prostitute, did derive support and maintenance in part from the earnings and proceeds of her prostitution, is sufficient, although that statute did not go into effect until after the beginning of the three months named in the indictment and the acts charged to have been committed by the defendant were not indictable during the first part of the period described. *Commonwealth* v. *Peretz*, 253.

PLEDGE.

Suit in equity by one who, as surety for a partnership, pledged certain personal property to a creditor of the partnership, to compel the creditor to apply first to the satisfaction of the debt securities furnished by the partnership. *Bearse* v. *Lebowich*, 344.

POWER.

If one of two heirs at law of a testator is given by the will a beneficial interest in a trust of real estate and a power to dispose of the real estate by will, and, before the appointment of a trustee, mortgages the real estate with full covenants of warranty, and later is appointed trustee with power to sell the real estate for his own benefit and then acquires by deed the entire interest of the other heir at law, a merger occurs which extinguishes the

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trust and makes ineffectual against the mortgagee a deed by a trustee appointed to succeed such heir at law on his resigning. *Langley* v. *Conlan*, 135.

Where a beneficiary of a trust in real estate created by will, who is given a power to dispose of the property by will, mortgages the property with full covenants of warranty before a trustee is appointed, he is estopped as against the mortgagee from exercising the power of disposing of the property by will so long as the mortgage is in force. *Ibid.*

By St. 1909, c. 527, § 8, a succession tax is imposed upon the equal distribution of certain property among the children of the beneficiary for life under a deed of trust, made before September 1, 1907, in accordance with a provision of the deed, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to him by the deed to fix the proportions in which such property should be distributed among his children or grandchildren. *Burnham* v. *Treasurer & Receiver General*, 165.

The statute as so applied is constitutional. *Ibid.*

PRACTICE, CIVIL.

Parties.

While a separate action may be maintained by an executor or administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, against each of several persons whose negligent acts, otherwise disconnected, concurred to cause the death of the plaintiff's decedent, a single action against the several persons so negligent cannot be maintained. *Brown* v. *Thayer*, 392.

Where, in an action by a seaman for his wages the plaintiff improperly joined as defendants both the master and the owner of the ship and, in sustaining exceptions by the defendants, it was ordered that the plaintiff be given an opportunity to discontinue against one of the defendants, in which case the exceptions were to be overruled. *Bingham* v. *Monroe*, 455.

Trustee Process.

See TRUSTEE PROCESS.

Amendment.

Under R. L. c. 173, §§ 48, 52, the Superior Court may allow a suit in equity, originally brought as an action at law and changed by amendment into such suit, to be amended again into an action at law, with an appropriate change of parties, "to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought." *Cormier* v. *Brock*, 292.

An administrator in a single action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, improperly joined two defendants whose negligence concurred to cause the death of the plaintiff's intestate. At the trial of the action the presiding judge wrongly refused to rule that the defendants were improperly joined, and there was a verdict for the plaintiff. In sustaining exceptions by the defendants, it was ordered that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and that, upon such discontinuance being granted, the

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new trial should be confined to the question of damages. *Brown* v. *Thayer*, 392.

Interrogatories.

The limitation in R. L. c. 173, § 63, as interpreted in Wilson v. Webber, 2 Gray, 558, of the right to interrogate an adverse party given by § 57 of that chapter, so that such right did not include a right to a disclosure either of the facts by which or the medium through which the interrogated party proposed to prove his case, is not affected by St. 1909, c. 225, which amends § 57 by inserting in its place a provision giving a right to interrogate an adverse party "for the discovery of any facts and documents admissible in evidence at the trial of the action, except as hereinafter provided." *Looney* v. *Saltonstall*, 69.

Rules of Court.

Rule 23 of the Superior Court, see *Shawmut Commercial Paper Co.* v. *Cram*, 108.

Interlocutory Order.

In considering exceptions by the defendant to certain remarks in the nature of comments and rules contained in a paper entitled an "order" filed by a justice in recommitting an auditor's report, it was doubted whether the main part of the paper was anything more than a "memorandum," the contents of which would not be subject to exception. *Randall* v. *Peerless Motor Car Co.* 352.

Memorandum.

Where an indorsement by a judge upon a motion in writing failed to express an unequivocal oral ruling earlier made, it was held that the indorsement was inoperative as an adjudication on the motion and that, in later correcting the indorsement so that it conformed to the oral ruling, the judge committed no error. *Randall* v. *Peerless Motor Car Co.* 352.

In considering exceptions by the defendant to certain remarks in the nature of comments and rules contained in a paper entitled an "order" filed by a justice in recommitting an auditor's report, it was doubted whether the main part of the paper was anything more than a "memorandum," the contents of which would not be subject to exception. *Ibid.*

Election between Counts.

At a new trial of an action of contract, after the sustaining of exceptions alleged by the defendant, where the declaration contains two counts and the plaintiff elects to go to trial on the first count and to waive the second, it is within the discretionary power of the presiding judge to deny a motion of the defendant for an amendment of the docket entries for the purpose of showing that the plaintiff at the former trial of the case waived his first count and elected to proceed on the second and to rule that, even if the plaintiff made such an election at the former trial, he shall relieve him from it and allow him to elect to proceed at the new trial on the first count alone. *Fisher* v. *Doe*, 287.

Where in an action of contract the declaration contained a count on a promis-

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sory note by the payee against the indorser and a count for money lent to recover the same debt for which the note was alleged to have been given, and there was conflicting evidence on the question, whether or not delivery by the defendant was conditional, it was held that it was proper for the presiding judge to refuse to order the plaintiff to elect on which count of the declaration he would rely, and to rule that if the jury found for the plaintiff on the count on the promissory note they could not find for him also on the count for money lent. *Young* v. *Hayes*, 525.

Auditor.

An auditor to whom an action of contract is referred is not required in his report to make findings of subsidiary facts or a detailed statement of all the contentions of the parties. *Randall* v. *Peerless Motor Car Co.* 352.

An auditor to whom an action of contract has been referred properly may include in his report statements of the conflicting contentions of the parties on the subject of damages in order to show the wide variation in the evidence and to indicate that his findings, which differ from the contentions of both parties, are not the result of complete credence of the evidence of either side. *Ibid.*

Discussion by an auditor in his report of a question as to which evidence was excluded by him was held to be improper. *Ibid.*

The denial of a motion for the recommittal of an auditor's report, where such denial involves no ruling upon a question of law, is within the absolute discretion of the court. *Ibid.*

In recommitting an auditor's report in an action of contract, it is proper for the court, in regard to a request of the moving party that the auditor be given instructions as to what rule of damages he should follow, to rule that "the time has not come for the court to lay down the rule of law as to the damages which the plaintiff is entitled to recover, if he is entitled to recover." *Ibid.*

In considering exceptions by the defendant to certain remarks in the nature of comments and rules contained in a paper entitled an "order" filed by a justice in recommitting an auditor's report, it was doubted whether the main part of the paper was anything more than a "memorandum," the contents of which would not be subject to exception. *Ibid.*

Conduct of Trial.

Requests, rulings and instructions.

Where requests for rulings and instructions submitted to the judge by a party to an action on trial at the close of the evidence are voluminous and numerous, it is not a proper method of saving exceptions to the failure or refusal of the judge to grant some of the requests, for the excepting party at the close of the charge to the jury to ask generally that his exceptions be saved to the refusal of the judge to grant such requests as had not been covered by the charge, without first pointing out the requests for rulings which he contends have not been given. *Randall* v. *Peerless Motor Car Co.* 352.

An exception so saved was nevertheless considered and was held under the circumstances to have been immaterial. *Ibid.*

No exception can be sustained to the refusal of a presiding judge to rule as a

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matter of law that on the evidence the jury must find certain facts, where such facts should be determined by the jury under suitable instructions. *Gettins* v. *Kelley*, 171.

An exception cannot be sustained to the refusal of a presiding judge to give instructions based on fragmentary and indecisive parts of the evidence. *Hunt* v. *Boston Terminal Co.* 99.

Judge's charge.

Error of a trial judge in permitting certain objectionable cross-examination of a medical expert, which was held not to have been cured by the charge to the jury. *Allen* v. *Boston Elevated Railway*, 191.

Ordering Verdict.

Application of the rule that a verdict ordered must be taken, on a report by the trial judge, to have been ordered in view of the allegations of the declaration. *Granara* v. *Jacobs*, 271.

Verdict.

Where a jury, in recording their answer to one of several questions submitted to them by the presiding judge, made a clerical error in that they answered the question in the negative, which was favorable to the defendant, instead of in the affirmative, as they intended to, and their general verdict was in favor of the plaintiff, and the error escaped the attention of the judge and of both of the parties at the time the verdict was recorded, a motion by the plaintiff to have that answer set aside may be allowed without the general verdict being affected. *Randall* v. *Peerless Motor Car Co.* 352.

Statement and application of the rule of law that the conduct, motives or grounds of action of jurors in the jury room are not open to subsequent investigation by examination of the jurors, but that their testimony may be received to show that an error was made in the recording of the result of their deliberations after it was reached. *Ibid.*

Where at the trial of an action of contract the presiding judge submits several special questions to the jury, some of which are immaterial, and on the answers of the jury to those of the questions which are material the judge correctly orders a verdict for the plaintiff, exceptions by the defendant will not be sustained merely because it appears that an answer of the jury to one of the immaterial questions may have been inconsistent with their answers to others of the immaterial questions. *Boston Club* v. *Potter*, 23.

New Trial.

An administrator in a single action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, improperly joined two defendants whose negligence concurred to cause the death of the plaintiff's intestate. At the trial of the action the presiding judge wrongly refused to rule that the defendants were improperly joined, and there was a verdict for the plaintiff. In sustaining exceptions by the defendants, it was ordered that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and that, upon such discontinuance being granted, the new trial should be confined to the question of damages. *Brown* v. *Thayer*, 392.

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New trial which was ordered confined to a single issue as to which there had been an erroneous ruling at the earlier trial. *Randall* v. *Peerless Motor Car Co.* 352.

Where, at the trial of an action of tort for personal injuries resulting from alleged negligence of the defendant, in which the defendant does not admit that the plaintiff has been damaged, the trial judge commits error in admitting admission of incompetent evidence which is prejudicial to the defendant on the question of damages, a new trial should be ordered on all the issues of the case, since the plaintiff's right to recover at all depends upon whether he has suffered any damage. *Allen* v. *Boston Elevated Railway*, 191.

Mistake of Jurors.

Statement and application of the rule of law that the conduct, motives or grounds of action of jurors in the jury room are not open to subsequent investigation by examination of the jurors, but that their testimony may be received to show that an error was made in the recording of the result of their deliberations after it was reached. *Randall* v. *Peerless Motor Car Co.* 352.

Change of Ruling.

Change of a ruling which was held under the circumstances not to have harmed the defendant. *Randall* v. *Peerless Motor Car Co.* 352.

Correction of Records.

Where an indorsement by a judge upon a motion in writing failed to express an unequivocal oral ruling earlier made, it was held that the indorsement was inoperative as an adjudication on the motion and that, in later correcting the indorsement so that it conformed to the oral ruling, the judge committed no error. *Randall* v. *Peerless Motor Car Co.* 352.

Report.

Moot, speculative or subsidiary questions should not be reported to this court for determination under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *John Hetherington & Sons, Ltd.*, v. *William Firth Co.* 257.

A report by a judge of the Superior Court submitting to this court the correctness of his action upon a motion by a plaintiff asking for a ruling as to the scope of the inquiry at a second trial, the judge having made an interlocutory order narrowing the inquiry so that the trial would be brief, was held to have been made properly under the statute. *Ibid.*

On a report by the trial judge, a verdict ordered must be taken to have been ordered in view of the allegations of the declaration. *Granara* v. *Jacobs*, 271.

Where the judge who presided at a trial, after the jury under his direction have returned a verdict for the defendant, reports the case to this court and the report states as one question to be determined, whether "upon the facts" the ruling of the judge was correct, the word "facts" will be taken to include not only facts stated in the report as undisputed but also evidence stated in the report as to facts in dispute. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

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Appeal.

Under R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, no appeal lies from a ruling of a judge of the Superior Court sustaining an answer in abatement and ordering judgment for the defendant, where no judgment has been entered. *Regal* v. *Lyon*, 230.

Exceptions.

Allowance or disallowance of bill of exceptions.

Where a party to an action files a bill of exceptions containing two subjects distinguishable without difficulty, of which one improperly is included in the bill and the other properly is included and is stated truly, the bill should be disallowed as to the subject improperly in the bill and allowed as to the other subject. *Randall* v. *Peerless Motor Car Co.* 352.

If a defendant files a bill containing exceptions to rulings made at a trial and on a motion made after the trial, and subsequently files another bill setting forth exceptions to some of the rulings made after the trial which are contained in the first bill, and the first bill is allowed, the second bill, so far as it relates to matters covered by the first, should be disallowed. *Ibid.*

Whether exception was taken properly.

Where requests for rulings and instructions submitted to the judge by a party to an action on trial at the close of the evidence are voluminous and numerous, it is not a proper method of saving exceptions to the failure or refusal of the judge to grant some of the requests, for the excepting party at the close of the charge to the jury to ask generally that his exceptions be saved to the refusal of the judge to grant such requests as had not been covered by the charge, without first pointing out the requests for rulings which he contended had not been given. *Randall* v. *Peerless Motor Car Co.* 352.

Where an exception to evidence is not taken until after the evidence has been introduced and no motion is made to strike out the evidence, the exception must be overruled although the evidence was inadmissible because of incompetency. *Ibid.*

It is too late at the argument before this court of exceptions to the admission at a trial of certain evidence and to a certain portion of the charge to the jury, to urge as a ground for sustaining the exceptions that the subject with which the evidence and the portion of the charge in question dealt was not open under the pleadings, if no such ground was urged at the trial. *Ibid.*

Whether excepting party was harmed.

Error of a trial judge in permitting certain objectionable cross-examination of a medical expert, which was held not to have been cured by the charge to the jury. *Allen* v. *Boston Elevated Railway*, 191.

Where, at the trial together of two actions by the same plaintiff against different defendants for personal injuries caused by concurring negligence of the defendants in the two actions, the presiding judge wrongly rules that the plaintiff can recover in but one of the actions, and the plaintiff obtains a verdict in one of the actions and in the other a verdict is returned for the defendant, the plaintiff is prejudiced by the error and an exception by him

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should be sustained. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

Change of a ruling which was held under the circumstances not to have harmed the defendant. *Randall* v. *Peerless Motor Car Co.* 352.

Where at the trial of an action of contract the presiding judge submits several special questions to the jury, some of which are immaterial, and on the answers of the jury to those of the questions which are material the judge correctly orders a verdict for the plaintiff, exceptions by the defendant will not be sustained merely because it appears that an answer by the jury to one of the immaterial questions may have been inconsistent with their answers to others of the immaterial questions. *Boston Club* v. *Potter*, 23.

In an action by a workman against his employer for personal injuries caused by the breaking of the boom of a derrick which fell upon the plaintiff, where it appeared that the derrick was purchased as a second hand one, the defendant excepted to the admission of evidence of the price paid by the defendant for the derrick. There was no evidence as to the cost of a new derrick. *Held*, that the exception could not be sustained because it did not appear that the admission of the evidence harmed the defendant. *Roberts* v. *Vroom*, 168.

Construction of record.

In considering exceptions by the defendant to certain remarks in the nature of comments and rules contained in a paper entitled an "order" filed by a justice in recommitting an auditor's report, it was doubted whether the main part of the paper was anything more than a "memorandum," the contents of which would not be subject to exception. *Randall* v. *Peerless Motor Car Co.* 352.

General rules.

An exception cannot be sustained to the refusal of a presiding judge to give instructions based on fragmentary and indecisive parts of the evidence. *Hunt* v. *Boston Terminal Co.* 99.

A general exception to the admission of certain evidence at a trial will be overruled if the evidence was admissible upon any issue. *Randall* v. *Peerless Motor Car Co.* 352.

An exception to the exclusion of evidence by a trial judge will be overruled if the exclusion was proper for any reason, irrespective of the reason which the trial judge gave for excluding it. *Ibid.*

Brief before Full Court.

Certain matter, which was held to have been included improperly in a brief at the argument of exceptions before the full court, was ordered stricken from the brief. *Randall* v. *Peerless Motor Car Co.* 352.

Discontinuance.

An administrator in a single action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, improperly joined two defendants whose negligence concurred to cause the death of the plaintiff's intestate. At the trial of the

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action the presiding judge wrongly refused to rule that the defendants were joined improperly, and there was a verdict for the plaintiff. In sustaining exceptions by the defendants, it was ordered that the plaintiff might apply for leave to amend by discontinuing the action against one of the defendants, and that, upon a discontinuance being granted, the new trial should be confined to the question of damages. *Brown* v. *Thayer*, 392.

Where, in an action by a seaman for his wages the plaintiff improperly joined as defendants both the master and the owner of the ship, in sustaining exceptions by the defendants it was ordered that the plaintiff be given an opportunity to discontinue against one of the defendants, in which case the exceptions were to be overruled. *Bingham* v. *Monroe*, 455.

PRACTICE, CRIMINAL.

Grand Jury Minutes.

A defendant in a criminal case has no right to require the production of the minutes of the testimony taken before the grand jury who found the indictment against him, for the purpose of contradicting witnesses for the Commonwealth who testified before the grand jury. *Commonwealth* v. *Goldberg*, 88.

Commitment of Defendant to Hospital for Insane for Observation.

St. 1909, c. 504, § 103, relating to the commitment of a defendant in a criminal case to a hospital for the insane for observation, was held not to delegate solely to the trustees and superintendent of such hospital the determination of the question, whether such defendant shall remain longer at the hospital. *Commonwealth* v. *Spencer*, 438.

Where a defendant has been so committed for observation "until the further order of court," the court upon its own motion and without violating the Fourteenth Amendment to the Constitution of the United States may order him returned to the jail from which he was transferred and may determine for itself the question of his insanity. *Ibid.*

Informality in the order of the Superior Court in such case which was held to have been immaterial. *Ibid.*

Examination of Jurors in Capital Case.

A judge presiding at the trial of an indictment for murder where the defense was insanity, who refused to make certain specific inquiries of each proposed juror and asked each juror the questions specified in R. L. c. 176, § 28, after having explained carefully to all of the panel the meaning of those questions, was held to have exercised his discretion wisely. *Commonwealth* v. *Spencer*, 438.

Motion to withdraw Plea of Guilty.

At the hearing upon a motion of the defendant in a criminal case for leave to withdraw a plea of guilty, the judge may refuse to receive as evidence an affidavit of the defendant if he declines to testify or to offer other evidence in support of his motion. *Commonwealth* v. *Crapo*, 209.

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Right of Defendant not to incriminate himself.

Equivocal reply of a defendant in a criminal case when a statement of an alleged accomplice, charging him with guilt, is read to him, was held to be admissible in evidence; but certain comments of the trial judge thereon were held to have been improper. *Commonwealth* v. *Goldberg*, 88.

Appeal.

An appeal to the Superior Court by a defendant in a criminal case who pleaded guilty in the court below does not entitle such defendant to a trial unless he is permitted by the appellate court to withdraw his plea of guilty. *Commonwealth* v. *Crapo*, 209.

PRESCRIPTION.

See Adverse Possession.

PROBATE COURT.

Parties.

In an appeal from a decree of the Probate Court allowing an instrument as a will, where no order has been made permitting a certain beneficiary to appear and be heard in support of the will, such beneficiary is not a party to the suit, although the record shows an appearance of an attorney at law in his behalf in favor of the petition of the executor; and accordingly the contestants, having summoned such beneficiary as a witness, have not the right to cross-examine him as an adverse party under R. L. c. 175, § 22. *Old Colony Trust Co.* v. *Wallace*, 335.

Conduct of Hearings.

In a contest as to the allowance of a will, a beneficiary who had not been permitted by an order of court to appear as a party supporting the will was held not to be a party, so that the contestants had no right to cross-examine him as an adverse party. *Old Colony Trust Co.* v. *Wallace*, 335.

Exceptions.

At the trial of an appeal from a decree of the Probate Court allowing a will, no exception lies to the refusal of the single justice to make a ruling which calls for a finding of fact which on the evidence before him he was not bound to make. *Old Colony Trust Co.* v. *Wallace*, 335.

PROSTITUTION.

Deriving Support from Prostitution, see that title.

PROTECTION, WRIT OF.

A writ of protection should not be issued at the request of the defendant in a suit in equity who is in another State, exempting him, while in attendance in this Commonwealth for the purposes of the trial of the suit, from arrest

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under R. L. c. 168, § 1, upon supplementary process issued under R. L. c. 167, § 80, in the suit on trial. *Ginn* v. *Almy*, 486.

PROXIMATE CAUSE.

See NEGLIGENCE, *Proximate Cause.*

PUBLIC USE.

Land appropriated to a public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. *Higginson* v. *Treasurer of Boston*, 583.

RAILROAD.

St. 1906, c. 463, Part II, § 80, prohibiting the acquisition of a prescriptive right in the land of a railroad corporation by an owner or occupier of adjoining land, has no application where the owner in fee of land, subject to an easement of a railroad corporation, has continuously and openly used and occupied the land as his own to the exclusion of the railroad corporation and with its knowledge and acquiescence, and contends that the railroad corporation has abandoned its easement. *Amee* v. *Boston & Albany Railroad*, 421.

Certain evidence which was held to be admissible to prove such abandonment. *Ibid.*

One, who is waiting in the south terminal station in Boston outside a fence separating the tracks and the platforms between them from the rest of the station, and who has purchased a ticket and intends to board a train of one of the railroad companies which are compelled by St. 1896, c. 516, § 9, to use that station, is not a passenger of such railroad company. *Hunt* v. *New York, New Haven, & Hartford Railroad*, 102.

In an action by an administrator against a railroad corporation for the suffering and death of a boy fifteen years of age caused by the explosion of a railroad signal torpedo which was the property of the defendant, it was held that the defendant was not bound reasonably to anticipate a carrying away of the torpedo by one of the intestate's companions, and that an explosion occurring while the boys were playing with the torpedo could not be found to have been caused by the negligence of the defendant or of its baggage master. *Jacobs* v. *New York, New Haven, & Hartford Railroad*, 96.

Liability for negligence, see NEGLIGENCE, *Railroad.*

RECEIVER.

Where by the by-laws of a social club incorporated under R. L. c. 125 annual dues become due on December 1 and are "payable quarterly in advance," the facts, that on a May 5 the property of the club was placed in the hands of a receiver by order of the Superior Court and that the members were deprived of some of the benefits of membership, do not exempt members from liability for dues for the entire year which began on the preceding December 1. *Boston Club* v. *Potter*, 23.

An action of contract for the collection of assessments imposed by an order

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Receiver (*continued*).

of a court of another State on the holders of policies in an insolvent mutual insurance corporation organized under the laws of that State under a provision in the policies which would not be valid in a Massachusetts policy, may be maintained by the receiver of the property of the corporation in the courts of this Commonwealth, when the contracts of insurance were made and were to be performed in such other State and there are valid. *Stone* v. *Old Colony Street Railway*, 459.

RECORD.

Correction by a judge of the record of his ruling upon a motion. *Randall* v. *Peerless Motor Car Co.* 352.

REFERENCE AND REFEREE.

Reference under an agreement relating to the ascertainment of the amount of loss sustained by the insured in a Massachusetts standard policy of fire insurance, which was held not to have waived the right of the company to insist upon the statements by the insured called for by the policy. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

RELIGIOUS SOCIETY.

Discussion by RUGG, C. J., of the rights of the owners of pews in houses of worship belonging to religious societies in this Commonwealth. *Massachusetts Baptist Missionary Society* v. *Bowdoin Square Baptist Society*, 198.

The owner of sixty-five pews out of a total number of one hundred and seventy-five in a church building belonging to a religious society incorporated under the laws of this Commonwealth, who by the by-laws of the society has only one vote as a member of the corporation, has proprietary rights in the church building corresponding to the number of his pews. *Ibid.*

In a suit in equity by the owner of sixty-five out of one hundred and seventy-five pews in a church building belonging to a religious society, to set aside a conveyance by the society to an incorporated church, it was held that the conveyance was a proper one under R. L. c. 36, § 54, and that the only relief to which the plaintiff was entitled was a decree establishing his property rights as a pew owner in the church building transferred to the incorporated church. *Ibid.*

Section 9 of R. L. c. 37 prohibits a corporation organized under § 1 of the statute consisting of the officers of an unincorporated church performing duties similar to those of deacons or wardens, when objection is made by the Commonwealth, from receiving a gift of property to be held by it in trust and not for its own special uses, which produces an income of more than $2,000 a year. *Chase* v. *Dickey*, 555.

The validity of such a gift can be brought in question only by the Commonwealth; but this may be done by the Attorney General on becoming a party to a suit which was not instituted by him. *Ibid.*

Although such section of the statute, when objection is made by the Commonwealth, prevents a church from taking property which produces an income of more than $2,000 a year, devised to it as trustee, it does not affect the validity of such devise, which must be determined independently of the statute. *Ibid.*

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In a suit in equity by the officers of an unincorporated church as a corporation under R. L. c. 37, § 1, to compel a transfer to the plaintiffs of real estate devised to the church upon an alleged charitable trust, where the Attorney General had become a party and had set up as a bar that the plaintiffs were incapable of holding the property because the income from it exceeded $2,000 a year, it was held that under the circumstances the only heirs at law of the testatrix should be allowed to intervene to the extent of being heard upon the validity of the trust. *Chase* v. *Dickey*, 555.

A residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me" is not void by reason of indefiniteness, assuming that such teachings are not more difficult of ascertainment than those of other Christian sects. *Ibid.*

In a suit in equity to test the validity of such a gift it was assumed that "the religion of Christian Science as taught" by its founder stood as a subject for charity upon the same footing as the religion of other Christian sects, but it was stated that an inquiry into the character of the teachings of the founder of Christian Science further than was possible on the record before the court would be necessary before it could be determined whether such assumption as to the religion so taught was justified. *Ibid.*

RES IPSA LOQUITUR.

Cases involving the doctrine of *res ipsa loquitur*, see that subtitle under NEGLIGENCE.

RES JUDICATA.

In an action by the tax collector of a town for the amount of a tax assessed upon personal property of the defendant, a decision of the board of appeal under St. 1909, c. 490, Part III, § 68, affirming, on an appeal by that town, a decision of the tax commissioner under St. 1906, c. 463, Part II, § 217, determining that the proportion of the franchise tax corresponding to certain shares of a Massachusetts railroad corporation, which were owned by the defendant at the time of the assessment of the tax which was the basis of the action, was due to a town other than the plaintiff's, is not an adjudication, binding on the plaintiff in favor of the defendant, to the effect that the defendant's domicil was in such other town. *Babcock* v. *Slater*, 434.

Also, see EQUITY JURISDICTION, *Res judicata.*

RESTRAINT OF TRADE.

See MONOPOLY.

RULES OF COURT.

Rule 23 of the Superior Court, see *Shawmut Commercial Paper Co.* v. *Cram*, 108.

SALE.

Validity.

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to

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purchase some of his shares, makes representations which he knows to be false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

Conditional.

One, who is in possession of a chattel under a contract of conditional sale by which the title is to pass to him upon the performance of the conditions of the contract, after he has made a part payment and when he has committed no breach, has an interest in the chattel which he can convey by a mortgage, properly recorded, so as to give the mortgagee the right to enforce the contract against the seller, and, if later the buyer is in default, such mortgagee by tendering to the seller the amount due on the conditional contract before the seller has taken possession of the chattel acquires the title to the chattel as against the seller. *Dame* v. *Hanson & Co.* 124.

Where, by a contract of conditional sale, the buyer of certain horses agreed "that if said goods and chattels . . . shall be attached or if I shall sell, mortgage, pledge or attempt to sell, mortgage or pledge the same . . ., or shall fail to pay said note at maturity, said [seller] shall have the right without any demand or notice to take immediate possession of said property and hold the same absolutely free from all claims and demands from me," it was said, that the title to the property would seem to have passed to the buyer subject to be divested at the option of the seller upon the happening of any of the contingencies named and the taking possession of the property by the seller pursuant to the condition. *Ibid.*

Delivery.

Evidence upon which it was held that it properly might be found, regarding a transaction involving an agreement for the purchase of a trustee's receipt representing shares of the stock of a corporation, that the parties intended the title to the property to pass to the buyer, subject to a lien of the seller for the unpaid balance of the purchase money, and that, upon the failure of the buyer to pay such balance, the seller could recover it in an action of contract. *Bellows* v. *McKenzie*, 601.

Evidence from which it was held that it could be found that there had been a constructive delivery of hay which had been measured in a "bent" and sold, although it had not been separated physically from the hay in an adjoining bent. *Carroll* v. *Haskins*, 593.

Acceptance.

Whether the implied warranty which arose upon the sale of certain goods by sample was waived by the buyer, was held to be a question of fact. *Borden* v. *Fine*, 425.

By Sample.

In a contract of sale by sample there is an implied warranty that the goods shall correspond with the sample in quality, and if the goods shipped under

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such a contract are of a quality inferior to the sample the buyer either may refuse to receive them or may retain them and recover damages. *Borden* v. *Fine*, 425.

Where there is a contract of sale by sample of cotton sweepings to be shipped in bags, the fact that the buyer had an opportunity for inspection before the bags were shipped to the consignee and that he made an examination of certain bags and rejected such portions as he observed to be defective, does not necessarily deprive him of the right to claim damages if on delivery to the consignee the cotton sweepings are found to be of a quality inferior to the sample; and it is a question of fact whether the buyer waived the implied warranty and accepted the contents of the bags as being in accordance with the contract. *Ibid.*

Of Good Will and Trade Name.

Where one, who had sold and conveyed to a corporation, formed for the purpose and using his full name in its corporate name, a valuable established business and its good will and the right to use his name in connection with such business, reserving to himself the right to use his own last name as a part of any firm or corporate name, sought to enjoin the corporation from changing its name to one containing his last name compounded with another name, it was held that the right reserved to the plaintiff to use his own last name as a business name was not an exclusive right but merely one to be used in common with the corporation. *Houston* v. *Magrane*, 569.

Purchaser's Right to Possession.

In an action for the conversion of a diamond ring, where there was evidence that the plaintiff purchased a particular diamond of the defendant with whom he left it to be set in a ring for an entire price of which he paid a part at the time of the purchase, it was held that the evidence warranted findings that the contract of sale never had been rescinded, that any lien that the defendant had upon the ring had been ended by a tender by the plaintiff, and that the defendant had converted the ring. *Wright* v. *Frank A. Andrews Co.* 186.

Vendor's Right to Purchase Price.

In an action for the purchase price of two of three car loads of potatoes, the first car load having been paid for, in which the purchaser contended that the action could not be maintained because of a shortage in the first car load, but it was held that the action might be maintained, the contract being entire and at no time having become severed, and rescission being impossible because the defendant had resold the first car load of potatoes. *Craig* v. *Lane*, 195.

Rescission.

If the owner of shares of stock in a corporation owning and developing a mine in a foreign country, for the purpose of inducing another person to purchase some of his shares, makes representations which he knows to be

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false as to the amount, character and value of the ore in the mine, and a purchase is thus induced, such representations are not mere estimates or seller's talk, and upon discovering the fraud the purchaser by a suit in equity against the vendor may have the sale rescinded and the money he paid for the shares repaid to him. *Ginn* v. *Almy*, 486.

SEAMAN.

A seaman who was hired by the master of an unchartered vessel may maintain an action for his wages against either the owner or the master; but he cannot maintain an action against both of them. *Bingham* v. *Monroe*, 455.

Action by a seaman against both the owner and the master of a ship for wages, where it was held that the finding of the jury against both defendants must be taken to mean that the vessel was unchartered, and that therefore the defendants were joined improperly. *Ibid.*

Deviation from a voyage agreed upon which was held to have put an end to an express contract of hiring of a seaman for a certain voyage on an unchartered ship and to have entitled him to recover his wages from either the owner or the master on a *quantum meruit*. *Ibid.*

Seaman on an unchartered ship has a like right of recovery where without his consent the master takes him on a voyage in a different direction from that agreed upon for an illegal purpose of which the seaman did not know and in which he did not participate. *Ibid.*

SET-OFF.

In an action of contract by the receiver of the property of an insolvent mutual insurance corporation organized in another State, to collect an assessment decreed to be due by the order of a court of that State assessing the policy holders under the terms of a contract of insurance, made in that State and there valid and which is held to be enforceable in the courts of this Commonwealth, the defendant can have no right of set-off or recoupment for the amount of his accrued claims under his policies, because this would give him a preference over other creditors and policy holders of the insolvent insurance company. *Stone* v. *Old Colony Street Railway*, 459.

SEWER.

Under St. 1897, c. 426, §§ 2, 4, St. 1903, c. 218, only the board of street commissioners with the approval of the mayor alone can authorize the construction of a sewer in Boston. *Sullivan* v. *Mandell*, 174.

SHIP.

Rights of a seaman of an unchartered ship to recover for his wages under certain circumstances, see *Bingham* v. *Monroe*, 455.

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STATUTE.

Construction.

Land appropriated to a public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. By RUGG, C. J. *Higginson* v. *Treasurer of Boston*, 583.

Although, where language in a statute has a plain meaning, such meaning cannot be affected by the character of proceedings before its enactment, records of such proceedings may be examined to assist in construing language in it of doubtful import. *Old South Association* v. *Boston*, 299.

The provision contained in St. 1799, c. 31, § 4, "that no canopy, balcony, platform of cellar-door, or step in any street, lane or alley, in the town of Boston, shall project into such street more than one tenth part of the width of the street, and in no case more than three feet," although negative in form is permissive in its nature. *Aldrich* v. *Boston*, 512.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 711.

STOCKBROKER.

Avoidance of contracts of an infant with a stockbroker who acted as his agent under his specific orders. *Benson* v. *Tucker*, 60.

STREET RAILWAY.

A right to fix fares given to a street railway corporation by a special charter, subject under the general laws to alteration or repeal, is not impaired by a statute reasonably regulating the fares to be charged for the transportation of pupils of schools. *Commonwealth* v. *Boston & Northern Street Railway*, 82.

St. 1910, c. 567, which is such a statute, is constitutional. *Ibid.*

It is the duty of a street railway company to protect its passengers from injuries resulting from harmful misconduct on the part of other passengers so far as such misconduct reasonably can be anticipated and guarded against, and to that end to use all practicable means consistent with proper efficiency in the management of its business which experience or a due consideration of the circumstances suggest. *Coy* v. *Boston Elevated Railway*, 307.

Actions against street railway companies for personal injuries, see NEGLIGENCE, *Street Railway*.

SUFFOLK COUNTY.

Res. 1910, c. 109, as amended by St. 1911, c. 482, regarding the appointment by the Supreme Judicial Court of commissioners to report upon "an adjustment and apportionment, if any, of the expenses of the county of Suffolk and the proportion thereof, if any, that should fairly be borne"

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by the municipalities of Chelsea, Revere and Winthrop, was held to be unconstitutional as an attempt to transfer to the judicial department a legislative power. *Boston* v. *Chelsea*, 127.

SUPERIOR COURT.

Powers of the Superior Court under St. 1909, c. 504, § 103, relating to the commitment of a defendant in a criminal case to a hospital for observation as to his sanity. *Commonwealth* v. *Spencer*, 438.

St. 1904, c. 448, which transferred from the Superior to the Land Court jurisdiction in the proceedings relating to real estate there enumerated of which the Superior Court formerly had exclusive jurisdiction, did not take away from the Superior Court its jurisdiction, concurrent with that of the Supreme Judicial Court, over suits in equity to enjoin irreparable injury to real estate in which the title to the real estate is put in issue. *Enfield* v. *Woods*, 547.

SUPPLEMENTARY PROCESS.

A writ of protection should not be issued at the request of the defendant in a suit in equity who is in another State, exempting him, while in attendance in this Commonwealth for the purposes of the trial of the suit, from arrest under R. L. c. 168, § 1, upon supplementary process issued under R. L. c. 167, § 80, in the suit on trial. *Ginn* v. *Almy*, 486.

SUPREME JUDICIAL COURT.

Certain matter, which was held to have been included improperly in a brief at the argument of exceptions before the full court was ordered stricken from the brief. *Randall* v. *Peerless Motor Car Co.* 352.

SURETY.

Where a third person, solely as an accommodation to a partnership, gave to a creditor of the partnership additional security for the payment of the partnership debt, the creditor understanding the real relation of the parties, and made with him a contract under seal which on its face could be construed as binding such third person and the partnership jointly as principals, it was held that by a suit in equity he might compel the creditor first to apply toward satisfaction of the debt the securities furnished by the partnership before resorting to those furnished by the plaintiff as an accommodation to them. *Bearse* v. *Lebowich*, 344.

Although one, advancing money to a partnership creditor as an accommodation to the partnership, made with the creditor a contract under seal which on its face could be construed as binding him jointly with the partnership to the creditor, in a suit in equity he was allowed to show by extrinsic evidence that he was merely a surety for the partnership and that the creditor knew that fact. *Ibid.*

The mere fact that a surety has not received any notice of, and has not consented to, an arrangement between the creditor and the principal debtor whereby immediate payment of the debt was not insisted upon at its maturity, payments were made from week to week and the rate of interest was

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changed from six to fifteen per cent, will not exonerate the surety from liability if there has been no agreement extending the time of payment for any definite period and it does not appear that such arrangement has acted to the surety's prejudice. *Bearse* v. *Lebowich*, 344.

TAX.

Assessment.

Where a city, which owns certain real estate that was given to it by a will to form a fund for a public charitable purpose, unlawfully assesses a tax thereon to the "devisees" of the testator and then sells the real estate, the purchaser cannot be compelled to pay the tax, although in the agreement for the sale was the provision, "Rents, taxes and insurance are to be adjusted as of the day of the delivery of the deeds," and the deed stated that the conveyance was "subject to taxes for the current year." *Massachusetts General Hospital* v. *Boston*, 20.

In an action by the tax collector of a town for the amount of a tax on personal property, where the defendant contended that she had changed her domicil to another town, the facts were held to warrant a finding that there had been no such change of domicil. *Babcock* v. *Slater*, 434.

In such action a decision of the board of appeal under St. 1909, c. 490, Part III, § 68, affirming, on an appeal by the town of which the plaintiff was tax collector, a decision of the tax commissioner under St. 1906, c. 463, Part II, § 217, determining that the proportion of the franchise tax corresponding to certain shares of a Massachusetts railroad corporation, which were owned by the defendant at the time of the assessment of the tax which was the basis of the action, was due to the other town, is not an adjudication, binding on the plaintiff in favor of the defendant, to the effect that the defendant's domicil was in such other town. *Ibid.*

Betterments.

An assessment of betterments by the board of street commissioners of Boston for a sewer which had been constructed without their authority was held not to ratify such unauthorized construction. *Sullivan* v. *Mandell*, 174.

Excise Tax upon Corporations.

The tax upon a domestic corporation provided for by St. 1909, c. 490, Part III, § 43, is an excise upon its franchise and not a tax upon its property. *Farr Alpaca Co.* v. *Commonwealth*, 156.

Constitutionality of that statute. *Ibid.*

Taxation under that statute of certain wool purchased in a foreign country by a domestic corporation and entered for warehousing in a United States bonded warehouse here. *Ibid.*

The excise tax imposed by St. 1909, c. 490, Part III, § 56, upon certain foreign business corporations having usual places of business in this Commonwealth is in no way a tax on property but is in effect the requirement of a license fee for the privilege of doing a local business in this Commonwealth. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

The imposition of such tax is not an unconstitutional interference with interstate commerce as applied to a corporation which at its place of business

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in this Commonwealth sells goods at wholesale and retail, one half of such sales being made to persons residing in Massachusetts and the other half for delivery to purchasers outside of Massachusetts. *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 35.

Nor is that statute unconstitutional under the Fourteenth Amendment of the Constitution of the United States as taking property without due process of law or as denying to any person within the jurisdiction of the Commonwealth the equal protection of the laws. *Ibid.*

A foreign corporation maintaining a factory in this Commonwealth for the manufacture of watch movements, which in this Commonwealth are combined with cases manufactured in other States and then are sold principally upon orders solicited and accepted outside the Commonwealth, not more than two per cent of the product being sold to purchasers in this Commonwealth, is engaged in this Commonwealth in the business of manufacturing, which is separable from the subsequent commerce involved in the sale of the product and is subject to the excise tax imposed by St. 1909, c. 490, Part III, § 56. *Keystone Watch Case Co.* v. *Commonwealth*, 50.

Of Legacies and Successions.

By St. 1909, c. 527, § 8, a succession tax is imposed upon the equal distribution of certain property among the children of the beneficiary for life under a deed of trust, made before September 1, 1907, in accordance with a provision of the deed, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to him by the deed to fix the proportions in which such property should be distributed among his children or grandchildren. The statute as so applied is constitutional. *Burnham* v. *Treasurer & Receiver General*, 165.

Exemption.

The exemption from taxation both of the land upon which the Old South Meeting House stands and of the land adjacent to it continues so long as the meeting house is preserved and used for the purposes of the charter, although the Old South Association puts the adjacent land to other uses which are not inconsistent with those purposes and which by yielding revenue may promote them. *Old South Association* v. *Boston*, 299.

Real estate and personal property given by will to a city to constitute a fund, the income of which is to be applied to park purposes, is exempt from taxation after an order of the city council accepting the gift and so long as the city retains it under the will. *Massachusetts General Hospital* v. *Boston*, 20.

In determining the validity of a tax assessed by the city of Boston upon property which it had received and was holding as the residuary legatee and devisee under a will for public charitable purposes, it was stated that neither in Burr *v.* Boston, 208 Mass. 537, nor in the present case had this court considered whether real estate situated in other towns and included in the same devise to the city was liable to taxation in those towns. *Ibid.*

Sale.

It is the duty of a collector of taxes upon receiving an offer from the purchaser at an invalid tax sale to surrender and discharge his deed or to

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transfer his title, in accordance with R. L. c. 13, § 44, to elect within a reasonable time whether he will accept a surrender or a transfer, and, if he makes no reply to the offer, his failure to elect within a reasonable time operates as a refusal to accept it and the purchaser has the same rights against the city or town that he would have had if there had been an actual surrender or transfer. *Spring* v. *Cambridge*, 296.

It seems that after such a refusal the right of the purchaser to recover from the city or town would not be affected by his releasing his interest to the owner of the land. *Ibid.*

Circumstances under which it was found that the plaintiff was in a position at the time of the trial to make a surrender or transfer at the election of the collector and offered to do so. *Ibid.*

TENDER.

In an action for conversion of a diamond ring, where there was evidence that the plaintiff purchased a particular diamond of the defendant with whom he left it to be set in a ring for an entire price, of which he paid a part at the time of the purchase, it was held that the evidence warranted findings that the contract of sale never had been rescinded, that any lien that the defendant had upon the ring had been ended by a tender by the plaintiff, and that the defendant had converted the ring. *Wright* v. *Frank A. Andrews Co.* 186.

On a petition under R. L. c. 201 by a contractor against the Commonwealth to recover the balance due on a contract for the construction of a public building, it was held that, even if the strict doctrine of tender was applicable as against the Commonwealth, there was evidence warranting a finding that an actual tender or further steps toward it had been waived by the petitioner, and that therefore it did not appear that in disallowing interest any error of law had been made. *Burr* v. *Commonwealth*, 534.

TOWN.

See MUNICIPAL CORPORATIONS.

TRADE NAME.

Suits in equity to enjoin the use of trade names. *Houston* v. *Magrane*, 569; *E. W. Burt & Co.* v. *Coes & Young Co.* 134.

TRESPASS.

Under a writ of attachment in an action of contract against the proprietor of a tailoring business conducted in two rooms, each connected with a corridor, one room being used as a workroom by the employees of the establishment and the other for dealing with customers, a constable has no right against the wishes of the defendant to place a lock upon the door leading from the corridor into the workroom and to keep the defendant and his employees from using that door. *Chetteville* v. *Grant*, 17.

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TRUST.

What constitutes.

A trust was created where the holder of a certificate of fraternal insurance has it made payable to a cousin, who agreed in writing that upon the death of the insured he would collect the proceeds of the certificate and hold them for the benefit of a friend, who had made certain cash advances for the insured and to whom the insured delivered the certificate. *Kerr* v. *Crane*, 224.

Validity.

A corporation under R. L. c. 37, § 1, consisting of the officers of an unincorporated church performing duties similar to those of deacons or wardens, is prohibited by § 9 of the same chapter, when objection is made by the Commonwealth, from receiving a gift of property to be held by it in trust and not for its own special uses which produces an income of more than $2,000 a year. *Chase* v. *Dickey*, 555.

A residuary trust provided for in the will of the founder of Christian Science "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me" is not void by reason of indefiniteness, assuming that such teachings are not more difficult of ascertainment than those of other Christian sects. *Ibid.*

In a suit in equity to test the validity of such a gift it was assumed that "the religion of Christian Science as taught" by its founder stood as a subject for charity upon the same footing as the religion of other Christian sects, but it was stated that an inquiry into the character of the teachings of the founder of Christian Science further than was possible on the record before the court would be necessary before it could be determined whether such assumption as to the religion so taught was justified. *Ibid.*

Where a gift by will of the residue of a large estate provided that such portion of the income as should be necessary should be used for the repair of certain buildings, and "that the balance of said income and such portion of the principal as may be deemed wise shall be devoted and used" for a general purpose alleged to be charitable, the provision for the repair of the buildings can be regarded as a charge on the fund subordinate to the main purpose of the trust, so that, if this should fail or be unenforceable, it would not affect the character of the true residuary provision of the will as to the "balance" of the income. *Ibid.*

Trust, created when the holder of a certificate of fraternal insurance had it made payable to a cousin, who in writing agreed that upon the death of the insured he would collect the proceeds of the certificate and hold them for the benefit of a friend who had made certain cash advances for the insured and to whom the insured delivered the certificate, was held to be valid and enforceable in a suit in equity. *Kerr* v. *Crane*, 224.

Investment of Trust Funds.

In a suit in equity by a trustee under a will for instructions as to whether he should treat as capital or as income certain preferred shares issued to him by the trustees of a voluntary association organized to acquire and hold securities and shares of the capital stock of certain street railway and other

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companies, the question of the propriety of the investment of trust funds in such shares was referred to as a question which was not presented by the record. *Gardiner* v. *Gardiner*, 508.

Capital and Income.

Certain preferred shares, issued by trustees for the benefit of a voluntary association to a trustee under a will "in payment of the dividend arrears on the preferred shares" then "outstanding," were held to be capital and not income in his hands. *Gardiner* v. *Gardiner*, 508.

It was held that a certain extra dividend, declared by a Pennsylvania railroad corporation payable in shares of stock of a New Jersey corporation which was subsidiary to it, should be treated by trustees who were stockholders of the Pennsylvania corporation as a part of the income of the trust. *Gray* v. *Hemenway*, 239.

In a suit in equity by trustees for instructions as to whether a certain extra dividend paid to them by a corporation of which they were stockholders was a part of the principal of the trust fund or should be distributed as income, it having been determined that the dividend should be distributed as income, it was held that the costs of the litigation should be charged upon the principal of the fund. *Ibid.*

TRUST COMPANY.

A trust company incorporated in 1890, "with all the powers and privileges and subject to all the duties, liabilities and restrictions set forth in all general laws which now are or may hereafter be in force relating to such corporations," under the express provisions of R. L. c. 116, § 18, may be appointed the executor of a will. *Old Colony Trust Co.* v. *Wallace*, 335.

TRUSTEE PROCESS.

Adverse Claimant.

After final judgment in an action brought by trustee process, one claiming goods, effects or credits in the hands of a supposed trustee in the action cannot be admitted as a party for the purpose of establishing his claim under R. L. c. 189, § 32. *Shawmut Commercial Paper Co.* v. *Cram*, 108.

Where, in an action of contract brought by trustee process in the Superior Court, an agreement for judgment has been made between the plaintiff and the defendant, and on the first Monday of a month, after interrogatories of the plaintiff to the only remaining trustee have been answered, a motion to charge such trustee has been allowed, the action on that day goes to final judgment under R. L. c. 177, § 1, and Rule 23 of the Superior Court; and thereafter that court has no jurisdiction to allow a motion to vacate the order charging the trustee *nunc pro tunc* as of the day it was made, nor to allow the filing of a petition under R. L. c. 189, § 32, by one asserting an adverse claim to the property in the hands or possession of the alleged trustee. *Ibid.*

Effect of Judgment as to Trustee.

Judgment, entered by agreement, discharging a trustee in an action brought by trustee process in which an adverse claimant had set up a claim that the

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debt of the trustee to the defendant had been assigned to him, was held not to be *res judicata* barring a suit in equity by the same plaintiff against the same defendant, the trustee, the claimant and others, in which it was alleged that the conveyance set up by the claimant in the action at law was made in the course of a conspiracy by all the defendants excepting the trustee to defeat, delay and defraud creditors of the principal defendant. *Hutchins* v. *Nickerson*, 118.

UNDUE INFLUENCE.

On an appeal from a decree for the plaintiff in a suit in equity brought in the name of an aged woman by the conservator of her estate to set aside a deed of real estate and a bill of sale of personal property executed by the plaintiff to one of her daughters, and alleged to have been procured by the undue influence of the daughter, the decree was affirmed, it being held that the finding of the trial judge on conflicting evidence could not be said to have been plainly wrong. *Campbell* v. *Lima*, 11.

Also, see WILL, *Undue Influence*.

USAGE.

See CUSTOM.

VOLUNTARY ASSOCIATION.

In a bill in equity by a trustee under a will for instructions as to whether he should treat as capital or as income certain preferred shares issued to him by the trustees of a voluntary association organized to acquire and hold securities and shares of the capital stock of certain street railway and other companies, the question of the propriety of the investment of trust funds in such shares was referred to as a question which was not presented by the record. *Gardiner* v. *Gardiner*, 508.

WAIVER.

In an action of contract, it was held that the question, whether the plaintiff had waived an exact performance of the contract by the defendant and had consented to a variation of its terms, was for the jury, and that the burden of proving such waiver was upon the defendant. *Wood* v. *Blanchard*, 53.

"Special agents" of certain fire insurance companies were held as matter of law under the circumstances to have no authority to waive for their respective companies the requirement of the sworn statement by the insured contained in policies in the Massachusetts standard form. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 318.

And an insurance company was held not to have made such a waiver by proceeding with arbitration under an agreement of reference which provided that "neither this submission nor the award of said referees shall in any way affect any other question than the amount of the aforesaid loss or damage, nor waive nor impair any right of any party hereto." *Ibid.*

Nor was such requirement waived by the company's attorney in certain correspondence with the attorney for the insured. *Ibid.*

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Where there is a contract of sale by sample of cotton sweepings to be shipped in bags, the fact that the buyer had an opportunity for inspection before the bags were shipped to the consignee and that he made an examination of certain bags and rejected such portions as he observed to be defective, does not necessarily deprive him of the right to claim damages, if on delivery to the consignee the cotton sweepings are found to be of a quality inferior to the sample; and it is a question of fact whether the buyer waived the implied warranty and accepted the contents of the bags as being in accordance with the contract. *Borden* v. *Fine*, 425.

On a petition under R. L. c. 201 by a contractor against the Commonwealth to recover the balance due on a contract for the construction of a public building, it was held that, even if the strict doctrine of tender was applicable as against the Commonwealth, there was evidence warranting a finding that an actual tender or further steps toward it had been waived by the petitioner, and that therefore it did not appear that in disallowing interest any error of law had been made. *Burr* v. *Commonwealth*, 534.

WATER RIGHTS.

A certain deed, which conveyed to the grantee and his heirs and assigns the right to the use of the water from certain springs in connection with his house and tannery, was held to have created an easement appurtenant to the grantee's house and tannery land, and not an easement in gross. *Willets* v. *Langhaar*, 573.

In a suit in equity to enjoin an alleged infringement by the defendant of a right, created by a deed, to use the waters of a certain spring, the question, whether the easement had been abandoned, was held to be a question of fact, the findings of a master upon which could not be said to be plainly wrong. *Ibid.*

WAY.

Public.

Relocation and layout.

Certain petition to a board of county commissioners was construed to have a single averment and a single prayer. Whether the prayer was for the relocation or the laying out of a way was not decided. *Main* v. *County Commissioners*, 182.

County commissioners have no jurisdiction to divide a single prayer of a petition, relocating part of a way described therein, under R. L. c. 48, § 12, and laying out another part under § 1. *Ibid.*

Action to be taken by county commissioners under R. L. c. 48, § 1, which provides for the laying out of a new highway from town to town or from place to place within the same town, or for the alteration or discontinuance of an existing highway, is fundamentally different from that to be taken under § 12 of that chapter, which provides for the relocation of a way within a town. *Ibid.*

Where, in dealing with a petition to a board of county commissioners containing a single prayer asking them "to lay out a highway over the route of" a town way and of a way called an "ancient way," the board erroneously laid out a highway over the alleged "ancient way" and relocated the town way, and the whole course of their proceedings indicated that they regarded

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Way (continued).

the two ways as designed to be used together and to serve one main purpose in common, a writ of certiorari was granted quashing the entire proceedings. *Main* v. *County Commissioners*, 182.

Rights of owner of fee subject to public way.

In a suit in equity to enjoin the defendant from interfering with an exclusive right of the plaintiff to use a certain spring and to compel him to remove pipes which for that purpose, after getting permission from the town, he had laid in land of the plaintiff over which a highway of the town passed, it was held that it was not necessary to determine either the meaning or the constitutionality of St. 1903, c. 459, relating to permission to be given by municipalities to persons and corporations for the laying under public ways of pipes and conduits for the conveyance of water. *Willets* v. *Langhaar*, 573.

Projections into way.

Construction of St. 1799, c. 31, § 4, as to projections into streets in Boston. *Aldrich* v. *Boston*, 512.

Defect.

An excavation on private land adjoining the sidewalk of a highway of a city, "cut right down square or nearly so from the edge of the sidewalk" to the depth of from three to three and one half feet, may be found to have made the use of the sidewalk so unsafe for travellers as to require the maintenance of a railing, for an injury caused by the want of which the city is liable under R. L. c. 51, § 18. *Thompson* v. *Boston*, 211.

WEAVING FINES.

See that subtitle under LABOR.

WIDOW.

Where the residuary clause of a will gave the testator's widow a life estate in the residue of the estate and disposed by specific devises and legacies of certain portions of the estate after her death, it was held that, as to so much of the estate as was not specifically mentioned, there was an intestacy, and that the widow could not share therein as a statutory heir, since it was clear that the testator intended the provision he had made for her to be full and final. *Bragg* v. *Litchfield*, 148.

WILL.

Construction.

Greater strictness is exercised in the construction of contracts than in the construction of wills. *Davis* v. *New York Life Ins. Co.* 310.

See also DEVISE AND LEGACY.

Undue Influence.

Exceptions, taken at the trial of issues in the Superior Court to the refusal of the presiding judge to rule that on all the evidence the execution of a certain will was not procured by the fraud or undue influence of certain

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persons or any of them, here were overruled on the ground that the questions presented were entirely questions of fact. *Bassity* v. *Welch*, 328.

A finding that the execution of a will was procured by the undue influence of a certain person may be warranted although the will contained no provision for the benefit of such person. *Ibid.*

WITNESS.

Cross-examination.

Questions allowed to be put to the defendant in an action of tort upon his cross-examination here were held not only to have been permissible as within the discretion of the presiding judge but also to have been plainly relevant to the issues on trial. *Gettins* v. *Kelley*, 171.

At the trial of an action of tort against a street railway company for personal injuries alleged to have been caused by a collision of cars, a medical expert testifying for the defendant cannot be asked in cross-examination whether he is familiar with any authorities which say that a certain disease, with which the plaintiff contends that he is suffering as the result of the accident, might come as the result of a blow, nor can he be asked questions about books written by persons other than himself. *Allen* v. *Boston Elevated Railway*, 191.

Error of a trial judge in permitting certain objectionable cross-examinations of a medical expert, which was held not to have been cured by the charge to the jury. *Ibid.*

In an appeal from a decree of the Probate Court allowing an instrument as a will, where no order has been made permitting a certain beneficiary to appear and be heard in support of the will, such beneficiary is not a party to the suit, although the record shows an appearance of an attorney at law in his behalf in favor of the petition of the executor; and accordingly the contestants, having summoned such beneficiary as a witness, have not the right to cross-examine him as an adverse party under R. L. c. 175, § 22. *Old Colony Trust Co.* v. *Wallace*, 335.

At the trial of an indictment for murder where the defense is insanity, a physician, whose opinion, offered by the defendant on the question of his insanity, has been excluded on the ground that he was not a person peculiarly skilled on questions of insanity or an attending or family physician of the defendant, may be asked in cross-examination whether or not in a certificate as to an examination he once had made of the defendant he had not answered in the negative the question, "Is the applicant suffering from any disease of the nervous system (chorea, epilepsy, etc.)," and to state that he had so answered and that the answer was true. *Commonwealth* v. *Spencer*, 438.

Contradiction.

An exception in a suit in equity to the admission by a master of evidence for the purpose of contradicting the testimony of the excepting party, where the evidence admitted tended only to contradict his testimony upon an immaterial matter and did not prejudice him, should be overruled. *Kelly* v. *Allin*, 327.

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Absence of Material Witness.

Unexplained failure of the wife of the defendant in an indictment for murder to testify as a witness in her husband's behalf as to certain facts material to his defense was held to be a proper subject for adverse comment by the Commonwealth. *Commonwealth* v. *Spencer*, 438.

Use of Testimony of Witness after his Death.

Use, after the death of a witness, of his testimony at a previous trial. *Randall* v. *Peerless Motor Car Co.* 352.

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